IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-579

WILLIAM A. MARTIN, AND F. LOUISE MARTIN, his wife,
Petitioners,

v.

GIRARD TRUST BANK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, William H. Martin and F. Louise Martin, wife, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered on June 22, 1977, which affirmed a judgment dismissing without leave to amend a petition for relief from a judgment entered by confession in favor of the respondent, Girard Trust Bank, in the amount of $3,156,940.37.

OPINIONS BELOW

The opinion of the Court of Appeals review of which relief is sought is reported at 557 F.2d 386 (3d Cir. 1977)

and is set forth at App. 28a *et seq.*[1]. The opinion of the District Court granting Girard's Motion to Dismiss petitioners' motion for relief from the judgment confessed below, is unreported and is reflected in the transcript of the argument of Nov. 5, 1976 (3d Cir. App. 96a-97a) and is embodied in the District Court's order of Nov. 5, 1976, set forth at App. 25a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 22, 1977. A timely petition for rehearing was filed on July 7, 1977 (App. 27a) and denied on July 20, 1977 (App. 27a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the court below violated petitioners' Fifth Amendment rights to due process of law, encompassing equal protection concerns, as well as petitioners' Seventh Amendment right to trial by jury and the plain spirit of the Federal Rules of Civil Procedure as articulated by this Court and hitherto universally understood when, in a confession of judgment case, the court below imposed a "common law" "particularity" requirement for federal motion practice which substantively resurrects archaic, discredited pleading requirements, imposes substantially more onerous standards than have been imposed by the Federal Rules of Civil Procedure in non-confession of judgment cases and, at the same time, refused leave to amend so much as once?

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1. Citations to the Appendix to the petition are in the form "App. a." Citation to the Appendix printed for the use of the court below are in the form of "3d Cir. App. a."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the separately-bound Appendix beginning at App. 40a. They include the following:

1. United States Constitution, Amendment V.
2. United States Constitution, Amendment VII.
3. Federal Rules of Civil Procedure, Rules 1, 7(b), 9(b), 60(b), and 84.

STATEMENT OF THE CASE

This case involves fundamental principles of federal practice. Review in this Court is necessary primarily because this case has, so far, proceeded through the court system backwards.

The Judgment Below

The first event in this case's short history was the entry of a final judgment.[2] The second was the lapse of the thirty (30) days in which to appeal. Judgment below was entered pursuant to confession of judgment clauses contained in notes allegedly procured by fraud. Of the $3,156,940.37, $2,450,000 consisted of unpaid principal. A half million dollars consisted of collection fees, and a quarter of a million dollars were pre-judgment interest. Not one cent of any of this money from Girard ever went to petitioners ("Martin"). Instead, this money went to Medford Nurseries, Inc. ("Medford").

The Basic Facts

Originally, Martin owned Medford (App. 11a). But it should not be thought that the money went to Martin through Medford. Rather, in May of 1973, Martin hired Girard as *his* agent, as *his* "finder", to find buyers for *his* entire ownership interest in Medford (App. 11-12a). When Girard presented three *partial* purchasers ("the purchasers") to Martin, Martin, of course, thought Girard

2. The jurisdiction of the District Court was based on the diversity of the citizenship of the parties, petitioners being citizens of Florida and respondent being a banking corporation organized under the laws of Pennsylvania and having its principal place of business in Pennsylvania and by reason of the amount in controversy exceeding $10,000, exclusive of costs and interest. (See Complaint at ¶1; 3d Cir. App. 3a.)

was acting as *his* agent. Similarly, when Girard was "deeply involved in the negotiations" (App. 12a), Martin thought he was getting the sort of services for which he had paid (App. 12a).

So it was that the lamb was led to slaughter. Martin sold 75% of his ownership of Medford to the purchasers. He was now, therefore, a minority, 25% stockholder. Together with Girard, the purchasers, as majority stockholders, induced Martin to sign a note for a loan of $2,000,000, for Medford. While Martin was led to believe that all would be equally liable, the fact is that the purchasers and Girard had agreed that, in the event of default, Girard would look only to Martin (App. 17a). The record below, even at this early stage, reflects Girard's nefarious agreements. While Girard forgave interest against the purchasers (App. 19a), Girard nonetheless confessed judgment against Martin for all of the interest.[3] While Girard arguably had a legal right to do so, Girard's confidential relationship with Martin, especially as his finder, obligated Girard to disclose any such conflicting agreement. Girard has never made any such disclosure, nor has there been any opportunity so far to so much as inquire.

Three other notes, also for Medford, totaling principal of $450,000 were similarly procured from Martin.

The Procedural Situation Presented

Promptly after hearing of the confessed judgment, Martin filed a "Petition to Open, Vacate, Modify and Reduce the Judgment." (App. 1a.) The Court of Appeals held that this Petition was a motion for relief from judgment on grounds of fraud under Rule 60(b)(3). F.R. Civ. P.[4] (App. 34-35a.) The Court of Appeals then held that

3. Girard has since conceded that such interest should not be collected from Martin either. 557 F.2d at 391, n. 4; App. 37a.

4. The motion was timely filed within one year of the judgment. 557 F.2d at 380; App. 1a.

such a motion must "state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they perpetrate, with such definiteness and reasonable certainty that the court might see that, if proved, they would warrant the setting aside of the (judgment). *Chamberlain Machine Works v. United States*, [270 U.S. 347, 349 (1926)]." 557 F.2d at 390; App. 35a.

Thus, relying on a procedural system long outdated, the Court of Appeals utterly ignored the actual procedural posture of the case, *i.e.*, the outset of the litigation, apparently giving controlling weight to the fact that this case began with a final judgment instead of ending with one.

Essentially, the Court of Appeals disregarded the *actual* procedural posture presented because of the *technical* procedural posture. Regarding its holding, the Court of Appeals itself acknowledged:

> "The requirement of Rules 7(b) and 9(b) that the circumstances constituting the fraud be stated with particularity *merely restates the long standing rule at common law.*" 557 F.2d at 390; App. 35a.[5]

It was such a "common law rule" that the Court of Appeals embraced and applied. *Id.*

More than this, the Court of Appeals largely ignored the consideration of the motion by the District Court. Girard did not answer the motion with a brief in opposition countering the averments of fraud. Rather, Girard moved to dismiss the motion as legally insufficient, thereby admitting the facts alleged, including the confidential relationship averred.

The District Court held that the motion for relief from judgment was insufficient as a matter of law. The transcript of argument indicates that the District Court

5. All emphasis is supplied unless otherwise indicated.

could not see just where the fraud was. The type of fraud involved has greatly contributed to the lower courts' difficulty in setting proper standards for motions and for relief from a confessed judgment. Because of this difficulty, petitioners set out the fraud involved at some length.

The Fraud Alleged

The fraud involved was the *omission* to state material facts by one with whom defendant was in a confidential relationship.

The most basic element of fraud in a nondisclosure case is a confidential relationship creating a right to the disclosure in the first instance. Pennsylvania law, controlling on this subject,[6] was well-articulated by Justice Roberts for the Supreme Court of Pennsylvania in *Young v. Kaye*, 443 Pa. 335, 279 A.2d 759 (1971):

> *"When the relationship between persons is one of trust and confidence, the party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage."* 279 A.2d at 763.

Earlier in that same opinion, the Pennsylvania Supreme Court noted other established principles of Pennsylvania law which are controlling:

> " 'It is *impossible* to define precisely what constitutes a confidential relation.' (Citation omitted.) *It is not restricted to any specific association of persons nor is it confined to technical cases of fiduciary relationship but is deemed to exist whenever the relative position of the parties is such that one has power and*

6. *See generally, Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

means to take advantage of or exercise undue influence over the other. (Citations omitted.)" *Young v. Kaye, supra,* 279 A.2d at 763.

Despite the "impossibility" of defining "what constitutes a confidential relation", the District Court undertook to decide this issue as a matter of law with virtually no record at all. In this regard, the District Court flatly disregarded controlling state law to the effect that:

> *"This well settled doctrine, founded on strong conconsiderations of public policy, renders inapplicable the general rule requiring an affirmative showing of fraud. To the contrary, transactions between persons occupying a confidential relationship are prima facie voidable,* and the party seeking to benefit from such a transaction must demonstrate that it was 'fair, conscientious, and beyond the reach of suspicion.' (Citations omitted.)" *Id.*, 279 A.2d at 763.

Martin clearly alleged a confidential relationship with Girard.[7] That the District Court failed to find the existence

7. ¶18 of the Petition to Open Judgment alleges that Martin hired Girard as his [Martin's] agent to find purchasers for part or all of Martin's interest in Medford. The petition further alleges the time when the hiring of Girard by Martin took place ("in the spring-summer of 1973"), the person employed by Girard with whom Martin dealt in hiring Girard as his agent (Franco), and the consideration to be paid Girard for its services to Martin ($75,000). (App. 11a.) ¶19 further alleges that Girard was "deeply involved in the negotiations leading up to and the eventual sale of" part of Martin's interest in Medford. (App. 12a) Martin, of course, thought this was as his agent and part of the services the bank was rendering to earn the $75,000 he had agreed to pay. The only other interest Martin was aware of was the bank's limited representation of Turner through Girard's employee' Grebe, as alleged in ¶21 (App. 12a.) Even from this alone, however, it is evident that the bank was on both sides of the transaction. What is not apparent—and was not apparent to Martin at the time—

of such a relationship, is just one indication of that court's pervasive error. It seems clear beyond peradventure that defendants' petition alleged both facts and circumstances giving rise to a relationship between Girard and Martin such that Girard allegedly had the "power and means to take advantage of or exercise undue influence over the other."[8]

Certainly, Girard has not demonstrated that the transactions were "beyond the reach of suspicion". Girard has not even attempted to do so. Thus, the transactions were *"prima facie voidable."* Surely that the underlying transactions were "prima facie voidable" is a meritorious defense sufficient to open a judgment confessed on such a transaction. Nonetheless, the Court of Appeals held that the motion for relief from judgment was not "particular enough" to open a judgment confessed on even such transactions. 557 F.2d at 390; App. 35a.

The second element of fraud by nondisclosure is a material fact. In this case, Girard's intentions constitute the material fact. This is not an unusual circumstance in the "confidential relation" context presented.[9] Martin alleged materiality in precisely the terms in which the doctrine is articulated. ¶44; App. at 19a.[10]

is to what further extent the bank was involved on the buyers' side of the transaction while supposedly representing the seller. These are the facts which have yet to be disclosed by Girard and the non-disclosure of which induced Martin to sign the notes as alleged in ¶44 (App. 19a.).

8. *Young v. Kaye, supra* controlling under *Erie, supra.*

9. In Pennsylvania, *"Fraud renders a transaction voidable even where the misrepresentation is not material * * *." De Joseph v. Zambelli,* 392 Pa. 24, 139 A.2d 644, 647 (1958).

10. The Supreme Court of Pennsylvania has defined materiality in the context as: "* * * when it is of such a character, that if it had not been made the transaction would not have been entered into. (Citation omitted.)" *De Joseph v. Zambelli, supra,* 139 A.2d at 647 (1958).

The third element is non-disclosure of the material fact required to be disclosed by reason of the confidential relationship. Martin's "petition" clearly alleges that "Girard and the Purchasers intentionally have concealed from Martin and his wife the fraudulent conspiracy and their agreements pursuant thereto." (¶42; App. 18a)

The fourth element of fraud in a non-disclosure case is that the party to whom the duty of disclosure is owed (Martin) did not have actual knowledge despite non-disclosure. Plainly implicit in the allegation that if Martin had known he would not have signed[11], taken together with the allegation admitting that Martin did sign the notes[12], is the plain allegation that Martin in fact did not know, and if this is the "fatal flaw," clearly Martin should be allowed to amend to allege *in haec verba* what is already implicit—that Martin had no idea whatsoever of Girard's agreements with the others.

The fifth element is that the party owing the duty to disclose, Girard, must have intended that the party to whom it owed such a duty, Martin, should rely on the ignorance created by its own non-disclosure. Girard's intent that Martin's ignorance be acted on by him is alleged in ¶42 App. 18a, which states that plaintiffs and its co-conspirators "induced Martin and his wife to sign the notes," having alleged not three lines above that "Girard and the purchasers intentionally have concealed from Martin and his wife the fraudulent conspiracy and their agreements pursuant thereto set forth above." (¶42; App. 18a). In context, the allegation is—or at least inferences reasonably to be drawn therefrom are—that Girard intended Martin to act in reliance on the ignorance Girard intentionally created.

Finally, there must be both reasonable reliance and damage by reason of that reliance. Defendants were damaged by becoming obligors on notes they otherwise would

11. ¶44; App. 19a.
12. ¶25; App. 13a.

not have signed. Their reliance was reasonable and that is also alleged. Both of these elements are alleged in Martin's motion for relief from judgment almost *in haec verba*. (¶44; App. 19a).

In short, Martin alleged that Girard, a party with whom Martin alleged a confidential relationship, had induced Martin to sign notes on which judgments were confessed below by failing to disclose certain material facts of intentional wrongdoing on Girard's part. Nonetheless, the Court of Appeals held that Martin's allegations were not sufficiently "particular" to open a judgment entered by confession on transactions which are, under applicable state law, "prima facie voidable." *Young v. Kaye, supra.* The Court of Appeals did not even allow an amendment to say "with particularity" what was already substantially said.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals does tremendous violence to due process of law, subjecting petitioners to an enormous judgment and depriving petitioners of their fundamental right to trial by jury solely because of their inability, at the very outset of the litigation, to set forth with a common law "particularity", a fraud perpetrated by respondent's omissions. By introducing a single all-encompassing standard for relief from judgment, no matter when or how that judgment came about, the decision distorts the proper application of the Federal Rules of Civil Procedure. By embracing the *common law* rule of "particularity" under the broad aegis of Rule 7(b) (1), Fed. R. Civ. P., governing motion practice generally, as that one, all-encompassing standard, the Court of Appeals' decision ignores the remedial purposes of Rule 60(b), Fed.R.Civ.P., and threatens motion practice nationwide at every stage of litigation. Moreover, the decision approves the very sort of double standard this Court impliedly condemned in *D.H. Overmyer v. Frick Co. of Ohio*, 405 U.S. 174 (1972). If allowed to stand, the decision below provides the enticing lure of simplicity, at the expense of substance, and will inflict serious wounds on sound principles of federal motion and pleading practice generally.

A. The Common Law "Particularity" Requirement Imposed on Motions.

The Court of Appeals held that the standards of "particularity" in Rules 7(b)(1) and 9(b), Fed. R. Civ. P., "merely restate the longstanding rule at common law." 557 F.2d at 390; (App. 35a.) It is quite apparent that the Court of Appeals adopted and relied on a *common law* formulation of "particularity." In this regard, the Court of Appeals ignored the history of Rule 7(b)(1), Fed.R.Civ.P., as understood and implemented by this Court.

13. App. at a.

The rules, as promulgated and adopted by this Court on December 20, 1937, were accompanied by an Appendix of Official Forms which, together with the rules themselves, became effective by virtue of Congressional silence on September 16, 1938. In four of those forms, this Court, with the approval of Congress, implemented the "particularity" requirement of Rule 7(b)(1), Fed.R.Civ.P. In Official Form No. 19, a form for a motion to dismiss for failure to state a claim was set forth:

> "The defendant moves the court as follows:
>
> To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted."[14] 28 U.S.C. at 7853.

That such a motion lacks the common law "particularity" required by the Court of Appeals below is plain. Furthermore, this clearly apparent lack of "particularity" in the common, as well as the common law sense, was pointed out by learned commentators at the time, including Barron & Holtzoff, *Federal Practice and Procedure* §244 (Wright ed. 1960) who noted:

> "Motions to dismiss for failure to state a claim on which relief can be granted rarely, if ever, set forth the detailed grounds on which the party relies, and such motions have the support of Official Form 19, *which is equally unspecific*, and which, by virtue of Rule 84, is expressly made sufficient. *Thus there can be no doubt that such a general motion is proper, despite the language of Rule 7(b)(1).* (Footnote omitted.)" 1A Barron & Holtzoff, *supra*, §244 at 19.[15]

14. Another of these forms is discussed *infra* at 1a-20.

15. This Court received volume 1A of Barron & Holtzoff, *supra*, on July 29, 1960. Card Record of the Acquisition Dept. (Kardex), United States Supreme Court.

Nonetheless, when this Court amended Official Form 19 in 1961, the only change was to reflect the difference of the amount in controversy. See Advisory Committee Note to 1961 Amendments to Rules, 28 U.S.C. at 7854; Explanatory Note, 28 U.S.C. at 7858; 7 *Moore's Federal Practice*, ¶84.02 at 84-3, n.2.

Had this Court thought any further "particularity" was required, this Court would surely have taken appropriate steps to bring it about, particularly in light of the matter's having been so plainly brought to this Court's attention.

That this was sufficient "particularity" is plain beyond question. Rule 84, Fed.R.Civ.P., expressly provides:

> "The forms contained in the Appendix of Forms are *sufficient* under the rules and *are intended to indicate the simplicity and brevity of statement which the rules contemplate.*"

That same sort of "simplicity and brevity" has continually been the object of the rules from their inception to the present day. The sort of procedural system sought at the outset is reflected in the remarks of Chief Justice Charles Evans Hughes in speaking of the Rules to be drafted:

> "It is manifest that the goal we seek is a simplified practice which will *strip procedure of unnecessary forms, technicalities and distinctions*, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances." Address to the American Law Institute, reported in 21 A.B.A.J. 340, 341 (1935).

The Advisory Committee quite clearly thought that the rules it drafted created such a procedural system. In a 1955 Report of the Advisory Committee to this Court, the Advisory Committee stated straightforwardly:

> ". . . [T]*he rules are designed to discourage battles over the mere form of statement. . . .*"[16]

Nonetheless, it is just such a battle "over the mere form of the statement" which the Court of Appeals has mandated in the consideration of every motion made in federal courts.

This Court, however, has indicated that the Federal Rules of Civil Procedure have done away with "mere battles over the form of the statement." In *Foman v. Davis*, 371 U.S. 178 (1962), this Court pointed out:

> "It is too late in the day and *entirely contrary* to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 371 U.S. at 182.

Similarly, in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966), this Court instructed without dissent:

> "*We cannot construe* Rule 23 or *any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair*

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16. Reported, 12 Wright & Miller, *Federal Practice & Procedure* at 591(1973). The quotation continues: "and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." *Id.* at 591-592. And the principal draftsman of the Federal Rules of Civil Procedure, Chief Judge Charles E. Clark, thought "particularity" was just another fruitless pursuit of the "will-of-the-wisp of pleading certainty." C. Clark, *Simplified Pleading*, 2 F.R.D. 456, 457-458 (1941).

trials, not through summary dismissals as necessary as they may be on occasion. *These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set* to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." 383 U.S. at 373.

The commentators have echoed the same sort of understanding. Professors Wright & Miller have well summed up the overall impact of the rules in their extensive canvass of federal practice and procedure:

> "These rules fully reflect *the basic philosophy of the federal rules that simplicity, flexibility and the absence of legal technicality are the touchstones of a good procedural system.*" 5 Wright & Miller, *Federal Practice & Procedure*, §1216 at 128 (1969).

All this the Court of Appeals ignored on the grounds that the "particularity" requirements for motions and fraud pleadings "merely restate the long standing common law rule." 557 F.2d at 390. That was mistaken. The basic philosophy of the Rules pervades all of the Rules. *See, e.g.*, Federal Rules of Civil Procedure, Rules 1 and 84.

But what the Court of Appeals' decision has done to federal motion practice generally is all the more alarming. This case would be somewhat different if the Court of Appeals had held that Rule 60(b) motions required some special "particularity" or that a higher degree of "particularity" was appropriate, somehow, because of the confession of judgment context. Then, this case would only involve one rule or one procedural context. However, the Court of Appeals rested its holding not on Rule 60(b) or on the confession of judgment context presented, but rather on

the broad command of Rule 7(b)(1) and the similarly broad command of Rule 9(b). The requirements of Rule 7(b)(1) alone govern every single motion made in a federal district court from the outset of litigation to the very last post-trial[17] or post-judgment motion made.[18] Similarly, Rule 9(b) governs the pleading of fraud or mistake in federal courts. By reading an earlier era's law into a single word in such general provisions, the decision below threatens federal motion and pleading practice generally and all but expressly repeals and effectively nullifies the reforms of the Federal Rules of Civil Procedure as applied to motions overall and to fraud or mistake pleadings as well. The decision below so thoroughly undermines and so pervasively repudiates the liberal practice and procedure in federal district courts, that only this Court is the proper forum in which to decide whether the entire structure of federal district court practice and procedure can or cannot be so easily toppled.

Petitioners respectfully submit that this Court in the Official Forms adopted and in its own opinions, has already rejected such a common law "particularity" requirement for motions under the Federal Rules of Civil Procedure. If allowed to stand, however, the decision below will inflict very serious wounds on basic principles of federal motion and pleading practice from the very first pre-trial motion to the very last petition for re-hearing. Clearly, a question

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17. It should be noted that "particularity" of the statement of grounds for a motion for a new trial under Rule 59, Fed.R.Civ. P., or for judgment n.o.v. under Rule 50(b), Fed.R.Civ. P., required to be made within 10 days of the entry of judgment, makes such motions virtually impossible since the record is rarely available from which to make such a motion sufficiently "particular."

18. The Court of Appeals did not say whether or not the common law "particularity" embraced by that court requires such a particularized recitation to support an *oral* motion, but the language of the court's holding certainly indicates that it would.

of such importance is one that only this Court should decide.[19]

B. Motions for Relief From Judgment—
The Need for a Proper Standard Sliding Scale.

The plainest principles of fairness require that a defendant be allowed a proper opportunity to present his defense. The Court of Appeals ignored this Rule by establishing a single, rigid standard of "particularity" for all motions quite regardless of the stage of the litigation involved.

The procedural posture presented is essential to an understanding of the holding below. Martin filed a "Petition to Open, Vacate, Modify and Reduce Judgment." Perhaps, technically, Martin should have filed a simple motion for relief from judgment on the grounds that the confession of judgment clauses were procured by fraud and for leave to file a proposed answer. Instead, Martin included, in his petition, a statement of the fraud which should have been set forth in a proposed answer to plaintiffs' complaint. This is the "motion" which the Court of Appeals insisted set forth the fraud with a common law "particularity." It seems clear that, in substance, Martin's "Petition" was a motion with a proposed answer attached. There seems little doubt such a proposed answer should have been

19. Certiorari is appropriate "to review undecided questions concerning the validity and construction" of the Rules. *Schlagenhauf v. Holder*, 379 U.S. 104, 109(1964), and to pass on questions of importance in the administration of the Federal Rules of Civil Procedure. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957). See also, *Johnson v. N.Y., N.H. & H. R. Co.*, 344 U.S. 48, 55 (1952):

> "Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation. That is what is involved in this case. The immediate issue is the construction of one of the important Rules of Civil Procedure." (Frankfurter, J. dissenting).

treated as any other pleading. Chief Judge Clark, the principal draftsman of the Rules, speaking for the court in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) instructed:

> "We must look beyond the mere mountain of words to the meaning sought to be conveyed." 248 F.2d at 325.

The Court of Appeals entirely failed to do that.

In this regard, the procedural posture presented is somewhat analogous to the situation in which a defendant moves for leave to intervene under Rule 24, Fed.R.Civ.P.[20] Official Form No. 23 demonstrates what "particularity" this Court considers sufficient. Official Form No. 23 reads:

Form 23. Motion to Intervene as a Defendant under Rule 24.

(Based upon the complaint, Form 16)
District Court of the United States for the Southern District of New York
Civil Action, File Number . . . .

A. B., plaintiff
v.
C. D., defendant
E. F., applicant for intervention
} *Motion to intervene as a defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's

20. It should be noted that Wright & Miller comment: "The proposed pleading must state a good claim for relief or a good defense *but the general rules on testing a pleading are applicable here.*"[7] A Wright & Miller, *supra*, §1914 at 569-570; *See also, e.g., Otis Elevator Co. v. Std. Const. Co., Inc.*, 10 F.R.D. 404, 406 (D. Minn. 1950).

claim presenting both questions of law and of fact which are common to the main action.[4]

Signed:
Attorney for E.F., Applicant for Intervention.
Address:

Notice of Motion

(Contents the same as in Form 19)

District Court of the United States for the Southern District of New York

Civil Action, File Number ....

A. B., plaintiff
C. D., defendant
v.
E. F., intervener
} *Intervener's Answer*

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed:
Attorney for E. F., Intervener
Address:

4. For other grounds of intervention, either of right or in the discretion of the court, see Rule 24 (a) and (b).

28 U.S.C. at 7860.

Compared to that Official Form, Martin's petition, however inartful, is a veritable citadel of specificity. Surely, a motion for relief from a judgment setting forth facts rendering the notes containing the confession of judgment

clauses on which the judgment below was entered "*prima facie* voidable", *Young v. Kaye, supra,* sets forth a meritorious defense.

There is quite a bit more involved, however, than petitioners' having followed the Official Forms of this Court. Just as the Court of Appeals ignored this Court's implementation of the "particularity" requirement for motions when it embraced a "common law" particularity, so too the Court of Appeals also failed to appreciate the broad remedial purposes of Rule 60(b), Fed.R.Civ.P. The decision below does tremendous violence to the vital role that Rule plays. As is pointed out in 7 Moore's Federal Practice ¶60.18[1] at 201, under original Rule 60(b), fraud was not one of the grounds specified for relief from judgment *by motion*. That this omsision was purposeful appears certain from the May, 1936 Draft and the April 1937 Draft, both of which provided for relief from a judgment obtained by fraud by motion. 7 Moore's, *supra,* ¶60.10[4] at 12-13. In amending Rule 60(b) in 1948, the Advisory Committee set out both the difficulty and the solution adopted by this Court. The Advisory Committee noted:

> "On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, *an independent action was the only proper remedy.* (Citation omitted.) The amendment settles this problem by making fraud an express ground for relief *by motion.*" 28 U.S.C, at 7827.

Thus, by the 1948 Amendment, the Court brought the simplified motion practice demonstrated in the Official Forms to motions for relief from judgments on the grounds of fraud. The decision below effectively nullifies that amendment in this regard by requiring a "particularity" sufficient to afford relief at "common law" in an independent action. This Court should not allow the 1948 amendment to be so effectively ignored.

The 1948 amendment is important for another reason. It was only in that year that Rule 60(b) was directed solely to final judgments. The Advisory Committee commented on the amendment that:

> "The addition of the qualifying word 'final' emphasizes the *character* of the judgments, orders or proceedings from which Rule 60(b) affords relief; . . . ." 28 U.S.C. at 7827.

By pigeonholing Martin's petition under the label "motion" rather than under the label "pleading", the Court of Appeals wholly disregarded "the character" of the judgments from which Rule 60(b) ordinarily affords relief as contrasted with the "character" of judgment by confession. Instead of tailoring the requirements of the Rule to realistically account for the actual stage of litigation involved, the Court of Appeals applied the same standard that would have applied, if at all, only after extensive discovery sought and had, a full, plenary trial, a jury verdict and post-trial motions. In short, the Court of Appeals completely ignored the simple fact that "final" judgments can be entered at many vastly different stages of litigation.

That there is no simple short cut, no single, acceptable standard can be readily seen by considering the judgments that might be entered at various different stages of proceedings and the proper amount of "particularity" to be required. The decision below imposes the same standard of particularity for relief from a judgment entered at the close of plaintiff's case, under Rule 41(b), Fed.R.Civ.P., at the close of *all* the evidence pursuant to a motion for directed verdict under Rule 50(a), Fed.R.Civ.P., and, by contrast, for relief from a judgment entered at the very commencement of the action pursuant to a motion to dismiss under Rule 12(b) or for summary judgment under Rule 56, Fed.R.Civ.P.

Abundant authority makes it plain that only a sliding scale can take proper account of the differences between

the stages at which the parties are expected to give generalized notice of their legal positions; that at which some, but really very little discovery has been had aside from identifications; that at which discovery is complete; that midway through trial; that at the end of trial; and, finally, that to which Rule 60(b) is ordinarily addressed: The stage of litigation following post-trial motions and exhaustion of appeals.

This is the plain implication of Professors Wright and Miller when they state of the Rule 60(b) motion:

> "There is *much more reason for liberality* in reopening a judgment *when the merits of the case never have been considered* than there is when the judgment comes after a full trial on the merits." [Footnote collecting cases omitted.] 11 Wright & Miller, *supra*, §2857 at 160.

To like effect are the comments of those authors that:

> "Many cases say that Rule 60(b) is to be liberally construed, *particularly* with regard to default judgments, *in order that judgments will reflect the true merits of a case.* [Footnote collecting cases omitted.] 11 Wright & Miller, *supra*, §2852 at 143.[21]

The Court of Appeals wholly failed to give meaning, purpose or effect to this fundamental policy of federal practice. By requiring at the outset the same sort of "particularity"—and a common law particularity, at that—that would have been required only after discovery, a plenary trial and verdict, the decision introduces a startling rigidity otherwise wholly repugnant to the Federal Rules of Civil Procedure.

In only one Official Form has this Court indicated the "particularity" required to allege fraud. Official Form No. 13 reads:

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21. To very similar effect in the comment that:

> "It *certainly* is true that it is the policy of the law to favor a hearing of a litigant's claim on the merits. [Footnote collecting cases omitted.]" Wright & Miller, *supra*, §2857 at 159.

Form 13.—Complaint on Claim for Debt and To Set Aside Fraudulent Conveyance Under Rule 18(b) **(amended)**

A. B., Plaintiff
v.
C. D. and E. F., Defendants } **Complaint**

1. Allegation of jurisdiction.

2. Defendant C. D. on or about ..... executed and delivered to plaintiff a promisory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on ..... the sum of five thousand dollars with interest thereon at the rate of ..... per cent per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about ..... conveyed all of his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ..... dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.[22] 28 U.S.C. at 7852.

In discussing what are and what are not sufficient allegations under Rule 18(b), Professors Wright and Miller assert that the pleader:

". . . must set forth each claim with the *same particularity* as would be required if they were brought

22. This Form was amended in 1963 to reflect the change in the amount in controversy from $3,000 to $10,000. Advisory Committee Note, 28 U.S.C. at 7854.

separately." (Footnote omitted.) 6 Wright & Miller, *supra*, §1591 at 824.

That rule was first announced so long ago and the Official Form has stood so long that it seems plain the Form implements this Court's understanding of the "particularity" requirements—and that understanding is entirely contrary to the decision of the Court of Appeals below.[23]

The Court of Appeals ignored all this, embraced a common law rule for all motions in federal courts, and imposed it at every stage of litigation quite regardless of the actual posture of the litigation presented. Plainly such a pervasive rule of pure form over substance should be reviewed by this Court.[24]

The facts of this case graphically illustrate the damage done to federal civil practice by the decision below. What has, in fact, taken place in the court below is that one partner of plaintiffs' law firm filed a complaint and, a few minutes thereafter, another partner of plaintiffs' law firm appeared for defendants, confessed everything and judgment was entered for more than $3,000,000 the same day the complaint was filed without more. Eight months later, defendants got their first notice of these proceedings when served with discovery in aid of execution. Other than these inquiries as to the whereabouts of defendant's assets, no discovery of any sort has been undertaken in the court below. Not a single interrogatory has been asked or answered; not one document has been sought or produced;

23. Certiorari is plainly appropriate where a decision of a court of appeals conflicts with the law enunciated by this Court. *E.g., Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

24. Certiorari is appropriate to consider important questions in the administration of the Federal Rules of Civil Procedure. *La Buy, supra.*

no one has testified to anything at all. Instead, lawyers have argued over paper allegations.

In short, that Martin did not "plead" or "petition" or "move" with the same "particularity" ordinarily found in post-trial motions should not be surprising. After all, there was no trial, no discovery, not even a single opportunity to amend defendants' first paper filed in this litigation. At this stage, it is wholly unrealistic to expect Martin to know all the particulars of a fraud which took place by — and is now continuing by — keeping Martin in the dark. By embracing a single rigid standard, the Court of Appeals has effectively shut off one of the major safety valves of the Federal Rules of Civil Procedure. Whether Rule 60(b), Fed. R. Civ. P., should be so rudely truncated is plainly a proper question for this Court.[25]

C. Due Process, Equal Protection and the Right to Trial by Jury in the Confession of Judgment Clause Context.

If allowed to stand, the decision of the Court of Appeals violates Martin's constitutional rights and would firmly establish an invidious and ungrounded distinction between pleading practice and motion practice by imposing a far heavier burden under Rule 7(b)(1), Fed.R. Civ. P., than has heretofore obtained under Rule 9(b), Fed. R. Civ. P. Such a course would make Rule 7(b)(1) a tool for the denial of the due process guarantees of the Fifth Amendment, encompassing equal protection concerns as well, and deny the fundamental right to trial by

25. Certiorari is appropriate where "the case presents an important problem under the Federal Rules of Civil Procedure". *Hickman v. Taylor*, 329 U.S. 495, 497 (1947); and see *Schlagenhauf v. Holder, supra; La Buy, supra;* and *Johnson v. N.Y., N.H. & H. R. Co., supra.*

jury under the Seventh Amendment in the routine administration of Rule 7(b)(1) by federal courts nationwide.

As recently as 1972, this Court, in *D. H. Overmyer Co., Inc. of Ohio v. Frick Company*, 405 U.S. 174 (1972), stated that confession of judgment clauses were not facially unconstitutional. However, as more specifically articulated in the concurring opinion, Ohio, through its rules of civil procedure, placed no heavier burden on defendants in their attempt to open a confessed judgment, as compared to defendants' burden in answering a complaint generally. The teaching of *Overmyer, supra*, is that such a procedural double standard does not square with equal protection guarantees, applicable in this case through the Fifth Amendment's due process clause.[26]

Clearly, federal procedure in federal courts should not erect or respect a double standard that Ohio could not impose. *E.g., Schlesinger v. Ballard*, 419 U.S. 498, 500 (1975). Under the teachings of *Overmyer*, it is therefore necessary to compare the pleading requirements under Rule 7(b)(1) for a "motion" for relief from judgment with the requirements for "pleading" the defense of fraud under Rule 9(b), Fed. R. Civ. P.

In interpreting the "particularity" requirement of Rule 9(b) regarding the pleading of fraud, federal courts have held that the degree of particularity required often depends upon the context in which the fraud is alleged to have occurred. 5 *Wright & Miller, supra* §1298 at 410. Hence, it it established that a "strict particularity" is not required *"as to matters peculiarly within an adverse party's knowledge." Temple v. Haft*, 73 F.R.D .49, 53 (D. Del. 1976).

In *Denny v. Carey*, 72 F.R.D. 574 (E.D. Pa. 1976), the Court similarly held that a rigorous pleading burden

26. The Fifth Amendment's Due Process clause clearly includes equal protection concerns. *E.g., Mathews v. De Castro*, 429 U.S. 181 at 182, n.1 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 500, n.3 (1975).

under Rule 9(b) was incorrect especially ". . . where many of the matters are peculiarly within the knowledge of the defendants." 72 F.R.D. at 578.

It is this very type of a situation with which we are dealing. Defendant plainly alleged that Girard had fraudulently concealed material facts from him, even though Girard had a duty to disclose those facts. (See Statement of the Case at 10, *supra*.) The details of this fraud, as alleged, were peculiarly within the knowledge of the plaintiff. Martin's allegations of fraud in the inducement clearly met the tests of "particularity" required by federal courts under Rule 9(b), Fed. R. Civ. P.

Contrarily, the Court of Appeals nonetheless demanded a strict common law "particularity" for this "motion" for relief from judgment under Rule 7(b). This double standard presents precisely the question this Court reserved for later decision in *Overmyer, supra*, 405 U.S. at 188.

Access to the courts is a matter laden with serious constitutional overtones. *Boddie v. Connecticut*, 401 U.S. 371 (1971). For the federal courts to routinely impose a heavier burden on a defendant seeking relief from a confessed judgment as compared to a defendant answering a complaint generally would be to impose an invidious discrimination among defendants seeking their day in court. It would establish an arbitrary discrimination. Whether access to the courts is pursued by way of pleading or motion, the Fifth Amendment's due process guarantees embodying equal protection concerns, clearly demand equality in procedural treatment.

Petitioners in *Overmyer, supra*, attacked a similar confession of judgment clause arguing that such a clause on its face violated due process rights to notice and hearing prior to a civil judgment. Although the Court refused to accept the *per se* facial attack advanced by petitioner in *Overmyer, supra*, the Court expressly reserved judgment

on the constitutionality of such clauses as applied.[27] That is the very question presented on this record.[28]

Petitioner herein contends that although the notice and hearing required by due process may be subject to waiver, *Overmyer, supra*, at 185, such a waiver must be made knowingly and intelligently, as has been required generally. *Brady v. United States*, 397 U.S. 742, 748 (1970). There must be "an intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In *Overmyer, supra*, this Court noted that the Court will not "presume acquiescence in the loss of fundamental rights." *Overmyer, supra*, 405 U.S. at 185-186; and see *Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 301 (1937).

Whatever the appropriate standard of waiver, it has not been satisfied on this record. Martin, in his petition, alleged that fraudulent concealment of material facts induced him into signing the notes containing the confession of judgment clauses. Plaintiff admitted that for the purposes of this motion by his motion to dismiss. (3d Cir App. at 600.)

Evidence of this fraud exists even at this early stage and would be further developed through discovery. Martin has, to date, been afforded no opportunity for any dis-

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27. As the *Overmyer* Court expressly stated in the text of that Opinion:

> "2. Our holding, of course, is not controlling precedent for other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." 405 U.S. at 188.

28. Certiorari is plainly appropriate to decide a question reserved for later decision. *E.g. Schlude v. Commissioner*, 372 U.S. 128, 130 (1963); *Wilkinson v. United States*, 365 U.S. 399, 401 (1961); *FTC v. Travelers Health Ass'n.*, 362 U.S. 293, 297 (1960); *Ickes v. Virginia-Colorado Corp.*, 295 U.S. 639, 640, 646 (1935).

covery whatever. Furthermore, Girard exclusively possesses much of the knowledge as to its own intentions as well as information regarding the financial liquidity of Martin's co-obligors. All of this Girard was obliged to disclose because of its confidential relationship with Martin and not one word of it has been disclosed to date.

As such, Martin made no *knowing* waiver of *any* rights. There was no "intentional relinquishment of a known right or interest," in the classic terms of *Johnson v. Zerbst, supra.* There was not even the passive "acquiescence in the loss of fundamental rights."[29]. What there *was* was fraud in the inducement, as alleged.

While confessions of judgment may not be *per se* invalid under the Due Process Clause, as applied by the courts below to the facts of this case, Martin was denied fundamental, constitutional rights. The wrongdoer, Girard, should not keep the fruits of wrongdoing at the expense of due process of law and trial by jury.

The course of the proceedings below would also deprive Martin of his fundamental right to a trial by jury on the fact issues.[30] Martin, in his motion for relief from the judgment confessed, alleged several issues of fact regarding the enforceability of the confessed judgment. When a defendant alleges such issues of fact constituting the defense of fraud in the inducement, a fundamental right arises to have these issues determined by a jury. As this Court held in *Taylor v. La.*, 419 U.S. 522 (1975):

> *"The purpose of a jury is to guard against the exercise of arbitrary power*—to make available the commonsense judgment of the community as a hedge against the over-zealous or mistaken prosecutor and

29. *Ohio Bell Tel. Co. v. Public Util. Comm., supra,* quoted in *Overmyer, supra,* 405 U.S. at 186.

30. A timely demand for trial by jury was made. See District Court Docket Entries, App. 1a.

> *in preference to the professional or perhaps over conditioned or biased response of a judge.* (Citation omitted.)" 419 U.S. at 530.

Under applicable Pennsylvania Law,[31] a meritorious defense was raised. *Young v. Kaye, supra.* Nonetheless, the District Court undertook to decide the factual issues presented on virtually no record at all. This is just the sort of "exercise of arbitrary power" this Court warned against in the absence of a jury in *Taylor v. La., supra.* The District Court invaded the exclusive province of the jury. The District Court's action thus violated Martin's fundamental right to have a jury determine the contested issues of fact. If permitted, district courts nationwide may follow this unlawful practice in their routine administration of Rules 7(b)(1) and 60(b) in the confession of judgment context.

Legal analysis easily lends itself to a step-by-step examination of the issues. Although this approach facilitates clarity and organization, it often tends to emphasize individual contentions at the expense of concealing the effect of the totality of the circumstances. Hence, even if in viewing each of petitioner's constitutional arguments in isolation, no technical violation of petitioner's constitutional rights might emerge, nonetheless, the totality of the circumstances plainly operated to deprive petitioner of due process of the law. It is not novel for this court to take account of a marriage of circumstances. *E.g., Neil v. Biggers,* 409 U.S. 188, 199 (1972); *Stovall v. Denno,* 388 U.S. 293, 302 (1967). The fact that petitioner was fraudulently induced to enter into the transactions on which judgment was confessed, that he met onerous "pleading" if not "motion" requirements, that he was not provided an opportunity to even once amend and clarify his "motion", and that he was prevented from presenting issues of fact before

31. *See generally, Erie v. Tompkins, supra.*

a jury, when viewed as a totality, clearly constitute a violation of petitioner's constitutional rights. *Overmyer, supra.* Plainly, the question reserved in *Overmyer, supra,* should now be decided by this Court.[32]

SUMMARY OF REASONS FOR GRANTING THE WRIT

Three major reasons for review have been set forth above. It would be unfortunate, however, if the details of particular reasons should cause sight to be lost of the overall effect of the decisions below. The District Court is now convinced that judicial discretion is unlimited discretion, that justice is a matter of grace.[33] The Court of Appeals has reached a result that threatens federal pleading and motion practice at every stage of litigation in federal courts nationwide. The short of the matter is that in a case coming into the court system backwards, by way of confession of judgment rather by way of complaint, the courts below have reached a hypertechnical result that is backwards, too. It is at war with everything the reforms of the Federal Rules of Civil Procedure stand for. It is so radical a departure from the ordinary course of judicial proceedings as to constitute a denial of due process of law and a

32. Certiorari is appropriate to review a question earlier reserved for later decision by this Court. *E.g., Ickes, supra* at n.28, *supra,* and other cases therein collected.

33. It is not insignificant that in an independent state action brought by Martin summarily removed by the defendants to federal court, a plainly required remand to the state courts was refused (*Martin, et ux. v. Medford, et al.*, Civil Action No. 76-3999, E.D. Pa., Order docketed July 18, 1977), and in yet another independent action brought by Martin in regard to this matter, the District Court has issued an injunction restraining further prosecution. (*Girard v. Martin et ux*, Civil Action No. 75-3602 (E.D. Pa. docketed July 20, 1977) (App. 4a).

deprival of the right to trial by jury. If allowed to stand, the decision of the Court of Appeals will inflict serious wounds on sound and pervasive principles of federal practice and procedure and will plague and clog the federal courts for years to come.

CONCLUSION

For the reasons stated, this writ should be granted and the Judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

Of Counsel:
DAVID BERGER, P.A.
Attorneys-at-Law

David Berger
1622 Locust Street
Philadelphia, Pa. 19103
Attorney for Petitioners

APPENDIX A.
DISTRICT COURT DOCKET ENTRIES

Appendix A

1	Dec.	15	Complaint filed.
	Dec.	15	Appearance of Earl T. Shamm as counsel for defts, filed.
	Dec.	15	ORDER to enter judgment and to assess damages, filed.
	Dec.	15	Damages assessed in the sum of $3,156,940.37.
	Dec.	15	Judgment by Confession in favor of plff and against defts, in the sum of $3,156,940.37 together with costs, filed. 12-16-75 entered and copies mailed.

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2	July	12	Entry of appearance of Michael Simon, David Berger, Esqs. as counsel for defts, filed.
3	July	12	Defts' notice of deposition of Harold Glassman, filed.
4	July	12	Defts' notice of deposition of John F. Kennedy, Esq., filed.
5	July	19	Deft, Wm. Martin's motion for a protective order with respect to the deposition of W. Martin and motion to quash the subpoena of deft Wm. Martin, notice and memorandum of law, filed.
6	July	19	Affidavit of Wm. H. Martin, filed.
7	July	19	Affidavit of Nicholas C. Bozzi, Esq., filed.
8	July	19	Memorandum of plff, Girard Trust Bank in opposition to deft Wm. Martin's motion for a protective order and motion to quash subpoena, filed.
9	July	19	Affidavit of David A. Carpenter, filed.
10	July	19	Affidavit of Howard T. Glassman, filed.
11	July	23	Report of Pretrial Conference Huyett, J., filed.
12	Aug.	2	Defts' petition to reduce, open, vacate and modify the judgment, filed.
—	Aug.	4	Pretrial Conference, Huyett, J.
13	Aug.	6	Report of pretrial conference, filed.
14	Sept.	8	Plff's motion to dismiss and motion of plff to dismiss the petition of defts Martin to open judgment, filed.
15	Sept.	13	Deft Wm. Martin's notice of motion to strike and certificate of service, filed.
16	Oct.	7	Defts' demand for Jury Trial, filed.
17	Oct.	7	Defts' memorandum in opposition to plff's motion to dismiss defts' petition to open judgment, filed.

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18 Oct. 7 Affidavit of Michael K. Simon re: petition to open judgment, filed.

19 Oct. 13 ORDER that a hearing shall be held on plff's motion to dismiss and the petition of defts to open judgment on 10-29-76 at 11:30 a.m. filed. 10-14-76 entered and copies mailed.

[14] Nov. 5 ORDER that the motion of plff is Granted and the petition of Wm. H. and F. Louise Martin to open and vacate, and modify and reduce the judgment is DISMISSED, filed. 11-8-76 entered and copies mailed.

20 Nov. 8 Hearing Re: Petition to open judgment on 11-5-76; Court ruled from the Bench—Motion to dismiss the petition etc. is GRANTED; Counsel for the deft moved for leave to amend petition which was DENIED by the Court. Court took motion for protective order under advisement, filed.

21 Nov. 11 Deft's notice of appeal, filed. (76-2471)

22 Nov. 11 Copy of Clerk's Notice of Appeal to U.S.C.A.; filed. 11-12-76 entered and copies mailed.

— Nov. 11 Bond for costs on appeal in the sum of $250 with Fidelity and Deposit Co. of Maryland as surety, filed.

23 Nov. 18 Transcript of 11-5-76 re: oral argument on plff's motion to dismiss the petition of defts. to open judgment, filed.

— Nov. 22 Original record transmitted to U.S.C.A. Not including Paper #19. (Sent per request of U.S.C.A.)

24 Nov. 22 Certified copy of Order received from U.S.C.A. that appellants' petition for stay of proceedings, and stay of discovery in aid of execution pending appeal is DENIED on condition that appellee Girard Trust Bank not seek to collect during the pendency of this appeal, etc. further ordered that the stay sought by appellants is Granted on condition that a bond in the amount of $3,156,940.37 less the sum of $364,610.92 and $225,373.20 be posted with the Clerk of the District Court, etc., filed.

25 Dec. 22 Motion of plff, Girard Trust Bank to enjoin defts Martin from prosecuting certain litigation in the Court of Common Pleas of Phila. County, Penna. and memorandum of law in support thereof, filed.

26 Dec. 27 Defts' Answer to plff's Motion for Injunction against Prosecuting Certain Litigation in the Court of Common Pleas of Philadelphia County, Pa.; Memorandum of Law in support thereof, filed.

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27 Jan. 12 ORDER that a hearing shall take place on motion of plff to enjoin defts from prosecuting certain litigation in the Court of Common Pleas of Phila. County on 2-11-77 at 9:30 a.m., filed. 1-3-77 entered and copies mailed.

28 Jan. 21 Reply memorandum of law of plff, Girard Trust Bank to defts' memorandum in opposition to plff's motion to enjoin the prosecution of certain litigation in the Court of Common Pleas of Phila. County, filed.

29 Feb. 8 Proposed Findings of Fact submitted by plff, Girard Trust Bank in support of its motion to enjoin defts, Wm. H. Martin and F. Louise Martin from prosecuting certain litigation in the Court of Common Pleas of Phila. County, Penna., filed.

30 Feb. 8 Proposed Conclusions of Law submitted by plff, Girard Trust Bank in support of its motion to enjoin defts Wm. H. Martin and F. Louise Martin from prosecuting certain litigation in the Court of Common Pleas of Phila. County, Penna., filed.

31 Feb. 11 HEARING: plff's motion to enjoin deft from prosecuting certain litigation in the Court of Common Pleas of Phila.—CAV, filed.

32 Feb. 15 Post-Argument memorandum contra motion for injunction, filed. (defts)

33 Feb. 17 Post-Argument reply memorandum of plff, Girard Trust Bank, filed.

— Mar. 8 First supplemental record transmitted to U.S.C.A. (Papers #24 & 27). (Record does not include Papers 25, 26 and 28 thru and including 33).

34 Apr. 5 Depositions of F. Louise Martin and Wm. H. Martin, filed.

— Apr. 7 Second supplemental record transmitted to U.S.C.A. (Papers #31 and 34 only).

35 Apr. 25 Depositions of F. Louise Martin and William H. Martin, filed.

— Apr. 26 Third supplemental record transmitted to U.S.C.A.

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36	July	20	MEMORANDUM, Huyett, J. and Order that the motion of plff to enjoin deft Martins from prosecuting a declaratory judgment action in the Phila. Court of Common Pleas is GRANTED, filed. 7-21-77 entered and copies mailed.
—	July	22	Fourth supplemental record transmitted to U.S.C.A.
37	July	28	Certified copy of Judgment Order received from U.S.C.A. wherein it is ordered that judgment of this Court filed 11-5-76 is AFFIRMED, etc., filed. (Costs taxed against appellants).
—	July	28	Record on appeal returned.
38	Aug.	23	ORDER dated 8-22-77 that the Memorandum dated 7-13-77 is AMENDED, etc., filed. 8-24-77 entered and copies mailed.
—	Sept.	6	Fourth supplemental record returned from U.S.C.A.

APPENDIX B.

DEFENDANT'S PETITION TO OPEN, VACATE, MODIFY AND REDUCE JUDGMENT

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GIRARD TRUST BANK
v.
WILLIAM H. MARTIN AND
F. LOUISE MARTIN, *h/w*

Civil Action
No. 75-3602

Defendants' Petition to Open and Vacate, and Modify and Reduce the Judgment

Defendants, William H. Martin ("Martin") and F. Louise Martin, through their counsel, David Berger, P.A. respectfully petition this Court to open and vacate and modify and reduce a judgment, wrongfully and inaccurately entered by confession in this Court on December 15, 1975, against both defendants, jointly and severally, in the amount of $3,156,940.37. In support of the Petition it is averred as follows:

1. This Petition is presented pursuant to Rule 60(b), Federal Rules of Civil Procedure, ("FRCP") the inherent equitable powers and supervisory powers of the Federal Courts with respect to judgments entered on their dockets, and the Pennsylvania provision for opening a confession of judgment, Rule 2959, Pennsylvania Rules of Civil Procedure ("Pa. RCP"), which this Court may utilize in the absence of a specific federal rule governing the opening of judgments by confession.

2. On December 15, 1975, Girard Trust Bank confessed judgment against defendants on the four following notes, attached to the complaint, in the total amount of $3,156,940.37, in this Court:

(a) Note dated September 21, 1973, in the principal sum of $2,000,000 due September 30, 1974;

(b) Demand note dated December 30, 1974, in the principal sum of $250,000;

(c) Demand note dated January 8, 1975 in the principal amount of $125,000; and

(d) Demand note dated January 20, 1975 in the principal sum of $75,000.

3. Girard Trust Bank proceeded by filing a Complaint, an Order to enter judgment and Order to assess damages in the amount of $3,156,940.37, an Entry of Appearance for defendants and confessions of judgment, and an Averment of Default. The docket entries of this action reflecting these pleadings and orders have been attached to defendant Martin's Memorandum in Support of his Motion to Quash his Subpoena, and his Motion for a Protective Order.

4. Girard Trust Bank directed the clerk to assess damages on each of the four notes, consisting of unpaid principal, purported unpaid interest, and purported valid collection fees of 18%, as set forth below:

Unpaid balance Note 9/21/73 ..	$2,000,000.00	
Interest through 11/30/75	184,763.91	
Collection fees (18%)	393,257.50	
Total—Note 9/21/73		$2,578,021.41
Unpaid balance—Note 12/30/74 .	$ 250,000.00	
Interest through 11/30/75	23,336.80	
Collection fees (18%)	49,200.62	
Total—Note—12/30/74		$ 322,537.42
Unpaid balance—Note 1/8/75 ..	$ 125,000.00	
Interest through 11/30/75	11,277.76	
Collection fees (18%)	24,530.00	
Total Note—1/8/75		$ 160,807.76

Unpaid balance—Note 1/20/75 .	$ 75,000.00	
Interest through 11/30/75	5,994.73	
Collection fees (18%)	14,579.05	
Total Note—1/20/75		$ 95,573.78
TOTAL		$3,156,940.37

5. The $3,156,940.37 judgment consists of $2,450,000 in unpaid principal, $225,373.20 in purported due interest, and an incredible collection fee of $481,567.17, 18% on not only the outstanding principal but the claimed outstanding interest.

6. Defendants never received notice of the judgment by confession against them and never received the documents evidencing the judgment. On June 30, 1976, Martin was improperly served with a subpoena for discovery in aid of execution after Girard Trust Bank did nothing for six months on its judgment filed on December 15, 1975 with this Court. On June 30, 1976, defendants first learned of the $3,156,940.37 confession of judgment, and the interest and collection fees claimed as part of the judgment.

7. Although Girard Trust Bank ("Girard") was fully aware of defendants' residence address in Florida as a result of its dealings and correspondence with them, Girard did not give the address to the clerk of this Court so the latter could send written notice of the judgment to defendants. Neither Girard nor the clerk sent notice to defendants and neither filed an affidavit of service.

8. Defendants have timely filed this Petition, moving a month after first learning of the nature and amount of the judgment.

9. The judgment includes a substantial excess over defendants' outstanding obligation to Girard Trust Bank on the four notes. As set forth below, the $481,567.17 in damages assessed as the 18% collection fee, and approximately $364,610.92 of the damages assessed for interest,

$225,373.20, and damages assessed as unpaid principal must be deducted as a credit from the judgment, for a total of approximately $846,178.09. Discovery will disclose the exact amount of the credit due defendants. In addition, in order for defendants to ascertain the accuracy of the stated amount of unpaid interest, accruing through November 30, 1976 ($225,373.20) on the four notes set forth in the judgment of confession, defendants must obtain through discovery Girard's loan account statements for the four notes showing the interest paid on them. Girard and its counsel have not responded affirmatively to defendant's request for these computerized statements. Defendants will be entitled to reduce the amount of the judgment further by any assessed interest charges in excess of the correct amounts. Accordingly, the overall reduction in the judgment arising from elimination of the collection fees, the credit, and any interest over charges will be determined after discovery.

10. The 18% collection fees of $481,567.17, entered pursuant to the terms of the notes, must be stricken from the judgment because they are unconscionable and unreasonable and unjust enrichment to the judgment creditor and are excessive penalty damages. This Court must exercise its equitable powers in setting aside a half a million dollars collection fee as remuneration for a few hours of Girard and their counsel preparing and filing boilerplate forms in connection with the judgment by confession. Counsel for plaintiff agreed at the conference before the Court on Friday, July 23, 1976, to amend the judgment by eliminating the collection fees. Pennsylvania Courts consistently reduce attorneys or collection fees set forth in notes, even where the amounts of the fees set forth in the notes are only a few hundred dollars, not half a million dollars, as in our case. Collection fees as low as five percent have been reduced to nominal fixed amounts or even eliminated where, as here, the amount of time and effort of the judgment creditor's counsel in obtaining the

judgment is *de minimus. Dunkle vs. Dunkle,* 115 P.L.J. 351 (C. P. Allegheny, 1967); *Estate of Wurmster,* 36 Dauphin Co. Repts. 315 (C. P. Dauphin Co.); *Kohler vs. Rudolph,* 51 Lanc. L.R. 481 (C. P. Lanc. Co. 1949); *Calvin vs. Batten,* 71 Mont. Co. L.R. 331 (C. P. Mont. Co., 1955) en banc; *Associates Discount Corp. vs. Hayden,* 27 D&C. 2d. 335 (C. P. Allegheny Co., 1960) en banc.

11. All four notes on which the judgment was taken were cosigned by the following persons in addition to defendants: Ernest Garfield ("Garfield") and his wife, W. Stanton Halverson ("Halverson") and his wife, and Maurice B. Turner ("Turner") and his wife. Messrs. Martin, Garfield, Halverson, and Turner and their wives were joint obligors on the notes.

12. In order to ascertain the exact amount of interest due and owing on the four notes as of November 30, 1970, defendants have prepared a schedule showing the floating interest rates on the notes, the prime rate for "large borrowers", plus two percent and showing the accrued interest on the notes. See Exhibit "A". As set forth above, defendants require Girard's statements in order to complete their verification of the interest.

13. Defendants are entitled to a reduction of approximately $364,610.92 in the interest and/or principal parts of the judgment, as a result of a settlement dated March 4, 1976, between Girard Trust Bank and Martin in certain litigation entitled *First National State Bank Mechanics, v. Medford Nursery, Inc., William H. Martin, Girard Bank, and the State of New Jersey,* Superior Court of New Jersey, Chancery Division, Burlington Co., Docket No. F-5251-74. The settlement provides, *inter alia,* that Girard shall be considered to have received $668,803.87 from a sheriff's sale held on January 22, 1976, of the premises of Medford Nursery, Inc. ("Medford"). These funds shall be applied as follows, pursuant to the settlement. Girard shall retain certain funds it paid to First National State Bank Mechan-

ics (Plaintiff in that action), for assignment of its claims to Girard, which funds total $186,324.68 plus a nominal additional amount of interest, which amount is presently unknown to Martin and must be ascertained by discovery. In addition, settlement provided that certain obligations of Martin to Girard in the total amount of $117,868.27, including interest, shall be considered satisfied, and that the balance of the funds, approximately $364,610.92, "shall be applied by Girard to the joint and several obligations of Martin and others to Girard". This settlement is attached to this Petition as Exhibit "B".

14. Defendants are petitioning to open and vacate the judgment on the basis that they have meritorious defenses to all or part of the claims, the four notes, on which the judgment is based. Accordingly, defendants seek to open the judgment so they may present their meritorious defenses to the jury. Beginning on or before July, 1973, and continuing through the present, Girard has entered into a fraudulent conspiracy with *inter alia*, Messrs. Garfield, Halverson, and Turner, and Girard has aided and abetted the other conspirators, for the purpose of enriching themselves at the expense of William H. Martin and F. Louise Martin. The acts set forth below were done pursuant to the conspiracy, and the conspirators aiding and abetting each other.

15. Based on the information set forth below, defendants respectfully request this Court to allow discovery on their Petition so that they may present a full and complete record in support of their Petition, demonstrating that their defense to the claims underlying the judgment should be submitted to the jury. The Federal Rules of Civil Procedure do not contain a specific provision governing the opening of judgment by confession. The Pennsylvania procedure for opening a judgment by confession expressly recognizes the right of a petitioner to conduct discovery and offer evidence in support of his meritorious defense

of the claims underlying the judgment by confession. Rule 2959 (c), Pa. R.C.P. Defendants need for discovery is particularly cogent in this case because defendants will be proving the existence of a conspiracy, and the actions taken pursuant thereto, which of necessity, must be shown by inferences and circumstantial evidence. In addition, the information, documents, and witnesses essential to proof of defendants' defense are within the exclusive possession and control of Girard and the other conspirators.

16. Martin was the founder of Medford. He was the sole principal and stockholder of Medford and its only President prior to July 25, 1973. At all times prior to July 25, 1973, Martin, his wife, and his nominee served as the three directors of Medford. Martin developed Medford into a successful wholesale plant business that operated as a tax shelter for him, as a Subchapter "S" Corporation for federal income tax purposes. Prior to July 25, 1975, Martin and his wife jointly owned a 135 acre tract and an 18 acre tract in Southampton Township, Burlington County, New Jersey, which they leased to Medford, and upon which Medford maintained its place of business.

17. Martin and Medford had no personal or business relationship with Girard or Messrs. Garfield, Halverson, and Turner, (together the Purchasers") or their wives, prior to the transactions occurring in the summer of 1973. Prior to that time, Martin and Medford conducted their banking business with several banks in New Jersey where Medford was located and where Martin then resided.

18. In the spring-summer of 1973 Martin was seeking a purchaser for all or part of his interest in Medford. A Vice-President of Acquisitions of Girard, John Franco, ("Franco") learned of Martin's interest in selling his Medford stock. Franco and Martin met and they agreed that Martin, as the seller, would pay Girard a $75,000.00 finders fee if a sale of Martin's Medford stock to Girard's

principals, Messrs. Garfield, Halverson, and Turner, was consummated. Franco then introduced the Purchasers to Martin and the deal was subsequently completed.

19. Girard not only acted as a successful finder, for which it was paid $75,000.00 by Martin, but Girard was deeply involved in negotiations leading up to and the eventual sale of 75% of Martin's Medford stock to the Purchasers, and the sale of the land owned by Martin and his wife, on which Medford was situated, to Medford.

20. On July 25, 1973, Martin, the Purchasers, Medford and Girard closed on a transaction, involving, *inter-alia*, the sale of the Martins' real estate to Medford. The Purchasers each agreed to acquire 25% of the issued and outstanding shares of Medford from Martin for a price of $160,000.00 each. On or about July 6, 1973, each of the Purchasers deposited $37,500.00, for a total of $112,500.00 of the purchase price, with Girard as the escrow agent. At closing on July 25, 1973, Girard paid the entire escrowed monies to Martin. The parties agreed that Girard would pay Martin the $112,500.00 escrowed monies as liquidation damages in the event that the sale did not close.

21. Turner, one of the Purchasers, executed a Power of Attorney to Francis R. Grebe ("Grebe"), Vice-President in the Trust Department of Girard, with respect to the closing on the Medford stock transaction. Girard, through Grebe, represented Turner at the closing.

22. Garfield and Halverson each paid Martin $160,000.00 in cash for his Medford stock, while Turner gave Martin a note in the amount of $112,000.00 and $48,000.00 in cash as consideration for the purchase of his shares. In connection with this transaction, Martin loaned Turner an additional $45,000.00 for which he received a note in that amount. In addition, Martin and each of the Purchasers advanced $75,000.00 immediately to Medford and committed themselves to an additional $25,000.00 advance to Medford.

23. As part of the overall transaction, Medford and Martin and his wife entered into an agreement, dated July 25, 1973, whereby the Martins sold two tracts of land, together with buildings and improvements thereon, to Medford for $258,000.00 in cash and a $602,000.00 note and purchase money mortgage on the property. This land had previously been leased by the Martins to Medford and the operations of Medford were situated on this property.

24. As part of the sale of Martin's stock in Medford to the Purchasers, Martin's wife and his nominee resigned as directors of Medford and each of the Purchasers became directors. Martin continued as President of Medford until Girard and the Purchasers demanded and received his resignation on or about February 4, 1975.

25. On September 21, 1973, the four principals of Medford, who were Martin and the Purchasers, together with their respective wives, signed a note in the amount of $2,000,000.00 to Girard, due September 30, 1974. This note was one of the four notes on which judgment by confession was taken by Girard on December 15, 1975. The proceeds of this loan went directly to Medford for repayment and satisfaction of other notes and liabilities and for working capital.

26. Medford guaranteed the September 21, 1973 note of its principals, and their wives, and secured its guarantee by giving Girard a security interest in its non-realty assets, which security interest has been perfected.

27. Martin opened a bank account with Girard in 1973 shortly after the September 21, 1973 loan from Girard, thus becoming a depositor with Girard.

28. On December 17, 1974, Girard loaned Martin, individually, $109,000.00 and on October 8, 1974, Girard loaned him, individually, $175,000.00. Accordingly, Martin became a good borrowing customer of Girard. His indi-

vidual obligations were first reduced and then fully satisfied pursuant to the settlement of the New Jersey litigation, as set forth in paragraph 13 of this Petition, attached as Exhibit "B".

29. The four principals of Medford, and their wives, signed joint demand notes to Girard of $250,000.00, $125,000.00, and $75,000.00 on December 30, 1974, January 8, 1975, and January 20, 1975, respectively. Proceeds of these notes all went to Medford for working capital. Girard's claims pursuant to these notes, in addition to its claim for the September 21, 1973 $2,000,000.00 note, formed the basis of its judgment by confession.

30. Girard stood in a fiduciary relationship with Martin beginning in July, 1973, by virtue of its acting as his finder, escrow agent, and overall agent with respect to the sale of 75% of his interest in Medford, by virtue of the borrower-lender relationship between Girard and Martin, as a purported joint obligor on the four notes set forth above, and as an individual borrower, by virtue of its depositor relationship with Martin, and by virtue of Girard's dealing with Martin in situations where Girard knew that Martin would be reasonably relying on Girard's actions and the accuracy, truthfulness, and completeness of Girard's representations to him. Accordingly, Girard had a duty to *inter-alia*, deal in good faith with Martin, to act as a fiduciary with respect to Martin and to disclose fully and truthfully information material to Martin. As set forth below, Girard has abrogated and violated its fiduciary relationship to Martin, and its duties to Martin.

31. On or before July, 1973 and continuing through the present, the affairs of Girard and the Purchasers, and the Purchasers' other companies have been inextricably intertwined. Girard and the Purchasers have been and are involved in a symbiotic commercial relationship in their mutual self interest, which has insured that with respect to the affairs of Medford, Girard and the Purchasers have

acted in their best mutual interest, to the detriment of Martin, who has been a relative outsider to the Girard and the Purchasers.

32. On or before July, 1973, and continuing through the present, Girard has been the banker for Garfield, Halverson, and Turner. In addition to the loan and deposit business they have given Girard, the Purchasers have given the Trust Department of Girard considerable business in the form of trust and estate administration, which business has been managed under the supervision of Grebe. In addition, Girard acted as the Purchasers' finder and representative in connection with their acquisition of their interest in Medford, receiving $75,000.00 from Martin as the finder. Girard, through Grebe, represented Turner under a Power of Attorney at the July 25, 1973 closing on the Medford stock acquisition. The Purchasers had been regular banking customers of Girard prior to July, 1973. After they acquired control of Medford in July, 1973, they proceeded to shift Medford's highly desired banking business to Girard. At that time Medford was a highly successful company and its commercial loan account was a "plum" for any bank. Although the four joint notes to Girard were signed by the principals of Medford and their wives, the proceeds were understood by all to go to Medford, which they did, and Medford guaranteed the loans and secured its guarantee by giving a security interest in its non-realty assets to Girard. The proceeds of the September, 1973 $2,000,000.00 Girard loan were used by Medford to pay off [its] loans and obligations to other institutions, which had previously enjoyed the lucrative banking business of Medford. Additionally, Girard financed the Purchasers' acquisition of the Medford stock and the Purchasers' loans to Medford. These Girard loans to the Purchasers enabled them to acquire the substantial advantages of taking over Medford, without committing substantial amounts of their own monies and without assuming any real risk.

33. The long standing close relationship among the Purchasers and Girard has continued through the present time. Since Martin's unjustified forced resignation as President of Medford in February, 1975, he has not been privy to the operation of Medford and has not had access to the Medford books and records. Even while Martin was President of Medford, he was only one of four directors, the other three being the Purchasers and/or their nominees, and he owned only 25% of the company. Accordingly, Girard and the Purchasers have operated and continued to operate Medford themselves, to the exclusion of Martin. Since March 4, 1976, Girard has owned the land and buildings in which Medford is operated, pursuant to the settlement of the New Jersey litigation discussed *infra*.

34. Both Girard and Garfield had realized substantial gain from their association with Narco Scientific Industries, Inc. ("Narco"). Narco is a major New York Stock Exchange company with over $60,000,000.00 in sales in its last complete fiscal year. It is in the business of, *inter-alia*, producing and distributing health and life-sciences equipment and related supplies. Garfield has been Chairman of the Board and Chief Executive Officer of Narco since December, 1974. Prior to that date he had been a Senior Vice-President and Chairman of the Executive Committee. As of January 1, 1976, Garfield owned 126,966 shares of Narco. His yearly salary from Narco in 1975 was approximately $70,000.00.

35. Girard is Narco's banker and stock transfer agent. For several years Girard has occupied one seat on the Narco Board of Directors which has been filled for many years by Robert M. Wachol, a director of Girard. In 1974 Wachol was joined on the Narco Board by a second representative and director from Girard, Robert G. Williams. In Narco's 1975 fiscal year, its loans from Girard were as high as $7,950,000.00. Girard's income from its loans to Narco has been substantial.

36. Halverson was Chairman of the Board and President of Narco prior to his resignation from these positions in 1974. He has been a stockholder of Narco. Halverson, as the chief officer of a major company whose banker was Girard, obviously maintained a close relationship with Girard and conducted his personal banking with Girard also. This close relationship between Halverson and Girard was in effect when Halverson and his partners, Garfield, and Turner, acquired the Medford stock, and when Girard lent Medford, through its principals, $2,000,000.00 in September of 1973.

37. Girard has been and is involved with the Purchasers in numerous other ventures, which involvement inures to the benefit of all parties.

38. Girard has granted special loans to the Purchasers at preferentially low interest rates below the current prevailing rate and below the rate charged Martin for comparable loans to him from Girard.

39. As a result of the financial interdependence between Girard and Purchasers, and their mutual interest in preserving each other's financial stability, Girard and the Purchasers entered into an agreement and understanding, pursuant to their fraudulent conspiracy, before the September 21, 1973 Girard loan and they have continued to have this understanding through the present. The conspirators' agreement and understanding since before September, 1973, has been that in the event of a default on any joint notes of the Purchasers and Martin, Girard will look solely to Martin for satisfaction of the note obligations and will execute solely on Martin's assets, while forgiving any liability or responsibility of the Purchasers on these notes. In addition, the conspirators have agreed in the event of a default on the joint notes to Girard, guaranteed by Medford, and secured by Medford's security interest, Girard will not look toward Medford for payment and/or execute on Medford's assets, because Garfield, Halverson,

and Turner own 75% of the stock of Medford. The conspirators have also operated under a basic agreement since the Purchasers acquired the Medford stock in July of 1973, viz., that in any financial dealings between Girard, the Purchasers, Medford, and Martin, the conspirators would maximize their joint interest, to the detriment of Martin's interest, and that they would take advantage of Martin's position as a minority shareholder of a closed corporation.

40. In July, 1973, Girard and the Purchasers knew of Martin's business accomplishments in founding and in profitably developing Medford, the First National Bank of Moorestown, New Jersey, the Continental Bank of New Jersey, and Russell Hopkins Glass Co., and they concluded that, in the event of a default on joint notes of Martin and the Purchasers, and their wives, Martin and/or his wife would be able to satisfy the note obligations.

41. Girard and the Purchasers at all times agreed and understood that in the event of a default on the four joint notes to Girard, and in the event that a problem of payment on these notes arose, both Girard and the Purchasers would treat these joint notes as the sole obligation of Martin and his wife.

42. Girard and the Purchasers intentionally have concealed from Martin and his wife the fraudulent conspiracy and their agreements pursuant thereto set forth above. The conspirators have fraudulently induced Martin and his wife to sign the four notes and to obligate themselves to payment of the principal amount of the four notes, $2,450,000.00, plus interest on the notes, by representing that the four notes were joint obligations of the four solvent principals of Medford, who signed the notes along with their wives, when in fact these notes were intended to be treated in the event of default, and have been treated after the default occurred, as the sole obligation of Martin and his wife.

43. Girard's involvement in this fraudulent conspiracy, its fraudulent concealment of the conspiracy, and its fraudulent inducement of Martin's obligating himself and his wife on the joint notes, have violated Girard's fiduciary duties to Martin and its duty to act in good faith with Martin.

44. If Martin, or any other reasonable person, had been aware of the conspiracy and the agreements and actions taken pursuant thereto, and if Martin had known that he and his wife were obligating themselves alone on the four notes, without any joint obligation by the Purchasers and their wives, Martin and his wife would have never entered into the loans and signed the notes. All proceeds from the joint notes to Girard were used by Medford, as opposed to by Martin.

45. The conspirators have implemented part of their scheme by releasing the Purchasers from all unpaid interest on the four joint notes. Although the conspirators and/or their agents, have informed Martin of this forgiveness of interest, they have refused his request to supply him with documentation of this agreement. By contrast, Girard's judgment by confession against Martin and his wife includes $225,373.20 in interest charges on the four joint notes.

46. The affidavits of Howard T. Glassman and of David Carpenter, previously submitted to this Court, in conjunction with Martin's motion to quash his subpoena, state that Girard has confessed judgments against Garfield, Halverson, and Turner and "all of the joint obligors, with the exception of the Defendants herein (the Martins), have made satisfactory arrangements with Plaintiff for liquidation of their joint and several and other obligations to the bank" (parenthesis added). Girard has refused to disclose to defendants and to the Court any information relating to these purported "satisfactory arrangements" despite specific requests for this information from defend-

ants. The withholding of this information demonstrates the absolute necessity for the defendants to be afforded an opportunity to conduct discovery on the matters set forth in this Petition.

Of Counsel:
DAVID BERGER, P.A.
Attorneys-at-Law

DATED: August 2, 1976.

Michael K. Simon
David Berger
Harold Berger
Michael K. Simon
1622 Locust Street
Philadelphia, Pa. 19103
Counsel for Defendants

Exhibit A

$2,000,000 BORROWED FROM GIRARD BANK 9/21/73

NOTE SIGNED BY - ERNEST GARFIELD, DOROTHY GARFIELD; WILLIAM H. MARTIN, F. LOUISE MARTIN, W. STANTON HALVERSON JR., SUZANNE L. HALVERSON; MARICE B. TURNER TREVA O. TURNER

INTEREST - 2% ABOVE GIRARD BANK PRIME

	FROM	TO	NUMBER of DAYS	INTEREST RATE PRIME	INTEREST RATE 2% ABOVE PRIME	TOTAL INTEREST
1973	SEPT. 21	OCT. 26	34	10	12	223616
	OCT. 27	DEC. 31	68	9 3/4	11 3/4	437808 2
1974	JAN. 1	JAN 29	29	9 3/4	11 3/4	186723
	JAN. 30	FEB. 10	12	9 1/2	11 1/2	75164
	FEB. 11	FEB. 19	9	9 1/4	11 1/4	55479 5
	FEB. 20	FEB. 27	8	9	11	48219 2
	FEB. 28	MAR 21	22	8 3/4	10 3/4	129589 0
	MAR 22	MAR 28	7	9	11	42191 8
	MAR 29	APR. 2	5	9 1/4	11 1/4	30821 9
	APR. 3	APR. 7	5	9 1/2	11 1/2	31506 8
	APR. 8	APR. 10	3	9 3/4	11 3/4	19315 1
	APR. 11	APR. 18	8	10	12	52602 7
	APR. 19	APR. 26	6	10 1/4	12 1/4	40274 0
	APR. 27	APR. 30	6	10 1/2	12 1/2	41095 9
	MAY 1	MAY 5	5	10 3/4	12 3/4	34931 5
	MAY 6	MAY 12	7	11	13	49863 0
	MAY 13	MAY 19	7	11 1/4	13 1/4	50219
	MAY 20	JUNE 26	38	11 1/2	13 1/2	271095 7
	JUNE 27	JULY 4	8	11 3/4	13 3/4	60274 0
	JULY 5	OCT. 9	97	12	14	744109 6
	OCT. 10	OCT. 22	13	11 3/4	13 3/4	97945 2
	OCT 23	OCT 29	7	11 1/2	13 1/2	51780 8
	OCT. 30	NOV. 7	9	11 1/4	13 1/4	65342 5
	NOV. 8	NOV. 18	11	11	13	78356 2
	NOV. 19	NOV. 25	7	10 3/4	12 3/4	48904 1
	NOV. 26	DEC. 31	36	10 1/2	12 1/2	246575 3
1975	JAN. 1	JAN. 13	13	10 1/2	12 1/2	89041 1
	JAN. 14	JAN. 19	6	10 1/4	12 1/4	40274 0
	JAN. 20	JAN. 26	7	10	12	46027 4
	JAN. 27	FEB. 2	7	9 3/4	11 3/4	45068 5
	FEB. 3	FEB. 9	7	9 1/2	11 1/2	44109 6
	FEB. 10	FEB. 23	14	9	11	84383 6
	FEB. 24	MAR. 2	7	8 3/4	10 3/4	41232 9
	MAR. 3	MAR. 9	7	8 1/2	10 1/2	40274 0
	MAR. 10	MAR 19	10	8	10	54794 5
	MAR. 20	MAR. 30	11	7 3/4	9 3/4	58767 1
			556			3768767 1

$2,000,000 BORROWED FROM GIRARD BANK 9/21/73

INTEREST - 2% ABOVE GIRARD BANK PRIME

	FROM	TO	NUMBER OF DAYS	INTEREST RATE PRIME	INTEREST RATE 2% ABOVE PRIME	TOTAL INTEREST
1	1973					
2	MAR. 30	BROUGHT FORWARD	556			37687671
3	MAR. 31	MAY 21	52	7 1/2	9 1/2	2706849
4	MAY 22	JUNE 10	20	7 1/4	9 1/4	1013699
5	JUNE 11	JULY 17	37	7	9	1824658
6	JULY 18	JULY 27	10	7 1/4	9 1/4	506849
7	JULY 28	AUG. 11	15	7 1/2	9 1/2	780822
8	AUG. 12	SEPT. 14	34	7 3/4	9 3/4	1816438
9	SEPT. 15	OCT. 26	42	8	10	2301370
10	OCT. 27	NOV. 4	9	7 3/4	9 3/4	480822
11	NOV. 5	NOV. 30	26	7 1/2	9 1/2	1353425
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13			801			50472603
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$250,000 BORROWED FROM GIRARD BANK 12/30/74

INTEREST - 2½% ABOVE GIRARD BANK PRIME

			NUMBER OF DAYS	INTEREST RATE PRIME	INTEREST RATE 2½% ABOVE PRIME	TOTAL INTEREST
1974	DEC 30	DEC 31	2	10 1/2	12 1/2	171 23
1975	JAN 1	JAN 13	13	10 1/2	12 1/2	1113 01
	JAN 14	JAN 19	6	10 1/4	12 1/4	503 42
	JAN 20	JAN 26	7	10	12	575 34
	JAN 27	FEB 2	7	9 3/4	11 3/4	563 36
	FEB 3	FEB 9	7	9 1/2	11 1/2	551 37
	FEB 10	FEB 23	14	9	11	1054 79
	FEB 24	MAR 2	7	8 3/4	10 3/4	515 41
	MAR 3	MAR 9	7	8 1/2	10 1/2	503 42
	MAR 10	MAR 19	10	8	10	684 93
	MAR 20	MAR 30	11	7 3/4	9 3/4	734 59
	MAR 31	MAY 21	52	7 1/2	9 1/2	3383 56
	MAY 22	JUNE 10	20	7 1/4	9 1/4	1267 12
	JUNE 11	JULY 17	37	7	9	2280 82
	JULY 18	JULY 27	10	7 1/4	9 1/4	633 56
	JULY 28	AUG 11	15	7 1/2	9 1/2	926 03
	AUG 12	SEPT 14	34	7 3/4	9 3/4	2270 55
	SEPT 15	OCT 26	42	8	10	2876 71
	OCT 27	NOV 4	9	7 3/4	9 3/4	601 03
	NOV 5	NOV 30	26	7 1/2	9 1/2	1697 78
			276			22952 37

FORM NO. 1106

$125,000 BORROWED FROM GIRARD BANK 1/8/75

INT. @ - 2% ABOVE GIRARD BANK PRIME

		FROM	TO	NUMBER OF DAYS	INTEREST RATE PRIME	INTEREST RATE 2% ABOVE PRIME	TOTAL INTEREST
1	1975	JAN 8	JAN 13	6	10 1/2	12 1/2	25685
2		JAN 14	JAN 19	6	10 1/4	12 1/4	25171
3		JAN 20	JAN 26	7	10	12	28767
4		JAN 27	FEB 2	7	9 3/4	11 3/4	28168
5		FEB 3	FEB 9	7	9 1/2	11 1/2	27568
6		FEB 10	FEB 23	14	9	11	52740
7		FEB 24	MAR 2	7	8 3/4	10 3/4	25771
8		MAR 3	MAR 9	7	8 1/2	10 1/2	25171
9		MAR 10	MAR 19	10	8	10	34247
10		MAR 20	MAR 30	11	7 3/4	9 3/4	36729
11		MAR 31	MAY 21	52	7 1/2	9 1/2	169178
12		MAY 22	JUNE 10	20	7 1/4	9 1/4	63356
13		JUNE 11	JULY 17	37	7	9	114041
14		JULY 18	JULY 27	10	7 1/4	9 1/4	31678
15		JULY 28	AUG 11	15	7 1/2	9 1/2	48801
16		AUG 12	SEPT 14	34	7 3/4	9 3/4	113527
17		SEPT 15	OCT 26	42	8	10	143836
18		OCT 27	NOV 4	9	7 3/4	9 3/4	30051
19		NOV 5	NOV 30	26	7 1/2	9 1/2	84589
20							
21				217			1109974
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$75,000 BORROWED FROM GIRARD BANK 1/20/75

INTEREST - 2% ABOVE GIRARD BANK'S PRIME

	FROM	TO	NUMBER OF DAYS	INTEREST RATE PRIME	INTEREST RATE 2% ABOVE PRIME	TOTAL INTEREST
1	1975 JAN 20	JAN 26	7	10	12	17260
2	JAN 27	FEB 2	7	9 3/4	11 3/4	16901
3	FEB 3	FEB 9	7	9 1/2	11 1/2	16541
4	FEB 10	FEB 23	14	9	11	31644
5	FEB 24	MAR 2	7	8 3/4	10 3/4	15462
6	MAR 3	MAR 9	7	8 1/2	10 1/2	15103
7	MAR 10	MAR 19	10	8	10	20548
8	MAR 20	MAR 30	11	7 3/4	9 3/4	22038
9	MAR 31	MAY 21	52	7 1/2	9 1/2	101507
10	MAY 22	JUNE 10	20	7 1/4	9 1/4	38014
11	JUNE 11	JULY 17	37	7	9	68425
12	JULY 18	JULY 27	10	7 1/4	9 1/4	19007
13	JULY 24	AUG 11	15	7 1/2	9 1/2	29281
14	AUG 12	SEPT 14	34	7 3/4	9 3/4	68116
15	SEPT 15	OCT 26	42	8	10	86301
16	OCT 27	NOV 4	9	7 3/4	9 3/4	18031
17	NOV 5	NOV 30	26	7 1/2	9 1/2	50753
18						
19			315			632732
20						

Exhibit B

Law Office:
Joseph F. Doyle, Esquire
867 Cooper Street
Deptford, New Jersey 08096
(609) 848-1450
Attorney for the Defendant,
William H. Martin

First National State Bank/ Mechanics, (Formerly known as Mechanics National Bank of Delaware Valley (A Banking Corporation organized and existing under the laws of the United States of America, *Plaintiff*,

vs.

Medford Nursery, Inc. (A New Jersey Corporation), William H. Martin, Girard Bank and The State of New Jersey, *Defendants*.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BURLINGTON COUNTY
DOCKET No. F-5251-74

Civil Action

Consent Order

This matter having been opened to the Court on the Motion of Joseph F. Doyle, Esquire, attorney for the defendant, William H. Martin and the attorneys for the moving party and for Girard Bank, also a defendant having agreed to a resolution of the matters to which this motion was directed. IT IS ON this 4th day of March, 1976, ORDERED as follows:

1. The motion is hereby withdrawn.

2. For all purposes, as between Martin and Girard, purchase by Girard Bank of premises foreclosed, by entering the successful bid of $100.00 at the sheriff sale held on January 22, 1976, shall be considered as a bid of $100.00 over and above the full amount of the mortgage foreclosed,

plus interest and costs to the date of sale, i.e., the sum of $668,703.87, plus $100.00 or a total sum of $668,803.87.

3. William H. Martin waives any right to claim fair market value in defense of any claim by Girard against himself.

4. Girard shall be entitled to all of the funds which would have been generated by the bid as considered in this order. Such funds shall be applied by Girard as follows:

A. To repay Girard for the funds paid to the plaintiff for an assignment of its claims.

B. To William H. Martin's personal obligations to Girard, which personal obligations are separate and apart from any joint and several obligations for which Martin may be responsible. Said individual obligations are based upon a promissory note executed by Martin to Girard on December 17, 1974 in the amount of $109,000.00, which with all credits being applied, has a present value of $100,000.00, and a promissory note executed by Martin to Girard on October 8, 1974 in the amount of $175,000.00, which with all credits being applied has a present value of $13,934.94. Interest on said obligations brings the total of both obligations to the present value of $117,868.27. These obligations shall be considered satisfied by virtue of this order.

C. The balance of funds available shall be applied by Girard to the joint and several obligations of Martin and others to Girard.

5. Girard agrees to forgive any claim it may have against Martin by subrogation or otherwise by reason of its payment to the plaintiff to purchase plaintiff's claim, which included a claim against Martin in the face amount of $25,000.00 based upon a promissory note from Martin to the plaintiff, dated the 12th day of August, 1974. Such

claim as Girard would have for that amount by subrogation or otherwise as a result of its payment to plaintiff is hereby satisfied.

6. Martin hereby waives (a) any claims he may have against Medford, also a defendant in this action, by subrogation or otherwise, by reason of the application of funds as set forth in paragraph (4)(A) hereof, and (b) any claims he may have under a certain Promissory Note of Medford dated July 25, 1973 in the principal amount of $602,000.00.

7. There being no actual surplus funds the cross-claims are moot and thereby dismissed.

8. There being no further matters in dispute, the entire action is dismissed. No costs to any party.

/s/

The Honorable Alexander C. Wood
J.S.C.

I hereby consent to the
form and entry of this
order

/s/

Frederick Rohloff
For Archer, Greiner & Read,
Attorneys for Girard Bank

/s/

Joseph F. Doyle
Attorney for William H. Martin

APPENDIX C.

DISTRICT COURT ORDER OF NOV. 5, 1976

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GIRARD TRUST BANK

v.

WILLIAM H. MARTIN AND
F. LOUIS MARTIN, *h/w*

Civil Action
No. 75-3602

ORDER

AND Now, this 5th day of November, upon consideration of the Petition of Defendants William H. and F. Louise Martin To Open And Vacate, And Modify And Reduce The Judgment in the above-captioned action, and the Motion and Memorandum of Law of Plaintiff Girard Trust Bank To Dismiss The Petition and for the reasons stated in open court following oral argument this date it is ORDERED that the Motion of Plaintiff Girard Trust Bank is Granted and the Petition of William H. and F. Louise Martin To Open And Vacate, And Modify And Reduce The Judgment is Dismissed.

/s/
Daniel H. Huyett, J.

APPENDIX D.

COURT OF APPEALS DOCKET ENTRIES

1976

Nov. 11 Certified copy of Notice of Appeal, received November 11, 1976 from counsel, filed.

Petition by appellants' for stay of proceedings, including a stay of execution and stay of discovery in aid of execution, pending appeal, received November 11, 1976, filed. (4cc) Certificate of Service Attached.

Submitted on above petition. Coram: Adams and Weis, C.J.

Nov. 15 Copy of Notice of Appeal rec'd from C. of D. C., filed.

Nov. 15 Appearance of Howard T. Glassman, Esq.; Wexler, Weisman, Maurer & Forman, P.C. for appellee, filed

Nov. 16 Answer of appellee, Girard Trust Bank, to appellants' petition for a stay of all proceedings pending appeal, with brief in support of answer, filed. (7 cc.). Certificate of service attached.

Nov. 18 Appearance of David Berger and Michael K. Simon, Esqs.; David Berger, P.A., for appellants, filed.

Nov. 19 Order (*Adams* and Weis, C. J.) denying appellants' petition for stay of proceedings, and stay of discovery in aid of execution, pending appeal, on condition that appellee Girard Trust Bank not seek to collect during the pendency of this appeal (a) $363,610.92, (b) $225,373.20 (see footnote, P. 8, Brief of Respondent Appellee Girard Trust Bank in opposition to the petition, etc.), and (c) an amount for collection fees; in the alternative, it is further ordered that the stay sought by appellants be and the same is hereby granted on condition that a bond in the amount of $3,156,940.37 less the sum of $364,610.92 and $225,-373.20, being a total of 2,566,956.25, be posted with the Clerk of the District Court for the Eastern District of Pennsylvania, said bond to remain in effect pending final disposition of this appeal and said bond to be approved by the said Clerk. In the event that appellants' elect to proceed pursuant to the provisions of this paragraph, the provisions of the second paragraph of this order are thereby to have no effect; and directing that the briefing in this case proceed strictly in accordance with the appropriate rules of the F.R.A.P. concerning time for filing briefs and the appendix, with no extension of time to be sought by any party; and directing that this appeal be listed for disposition at the earliest convenience of the Court, filed.

Nov. 19 Certified copy of above order to C. of D. C.

Nov. 22 Record, filed.

Dec. 28 Appendix, filed. (10 cc.).

1977

Jan. 3 Brief for appellants, filed. (25 cc.).

Feb. 2 Brief for appellee, filed. (25 cc.).

Feb. 9 Certificate of Service of appellee's brief by hand delivery on Feb. 3, 1977, filed.

Feb. 17 Reply brief for appellants, filed. (25 cc.).

Feb. 17 Affidavit of service of appellants' reply brief by hand delivery on February 17, 1977, filed.

Mar. 8 First Supplemental Record (Nos. 24 & 27), filed. (Papers 25, 26, 28 thru and including 33 not included.).

Mar. 14 Order (*Adams*, J.) directing 10 mins. argument for each side, filed.

Mar. 29 Argued. Coram: Adams, Rosenn and Weis, C.J.

Apr. 7 Second Supplemental Record (Nos. 31 & 34), filed.

Apr. 26 Third Supplemental Record (No. 35), filed.

June 22 Opinion of the Court (Adams, Rosenn and Weis, C. J.), filed.

June 22 Judgment affirming the judgment of the district court, filed November 5, 1976, without prejudice to the appellants to move for credits on the judgment entered by confession on December 15, 1975 to reflect the forgiveness of interest, settlement of certain litigation, and any excess attorneys' fees as may be determined by the district court, in accordance with the opinion of this Court; with costs taxed against appellants, filed.

June 30 Bill of costs for appellee, filed. (1cc) Service attached.

July 5 Petition for rehearing *en banc* by appellants, filed. Service attached.

July 20 Order (Seitz, Ch.J., Aldisert, Adams, Gibbons, Rosenn, Hunter and Garth, C.J.) denying appellants' petition for rehearing en banc, filed.

July 22 Fourth Supplemental Record (No. 36), filed.

July 28 Certified judgment in lieu of formal mandate issued.

July 28 Record and three supplements returned to Clerk of D.C.

Aug. 1 Receipt for record and three supplements from Clerk of D.C., filed.

Sept. 1 Fourth Supplemental Record returned to Clerk of D.C.

Sept. 7 Receipt for fourth supplemental record from Clerk of D.C., filed.

APPENDIX E.

COURT OF APPEALS OPINION AND ORDER OF JUNE 22, 1977

[Reported. 557 Federal Reporter, 2d Series 386]

GIRARD TRUST BANK, a Banking Corporation organized under the laws of the Commonwealth of Pennsylvania

v.

WILLIAM H. MARTIN and F. LOUISE MARTIN, his wife, *Appellants.*

No. 76-2471.

United States Court of Appeals,
Third Circuit.

Argued March 29, 1977.

Decided June 22, 1977.

[557 F.2d 387]

David Berger, Michael K. Simon, Philadelphia, Pa., for appellants.

Howard T. Glassman, Edward H. Rubenstone, Leon S. Forman, Wexler, Weisman, Maurer & Forman, P. C., Philadelphia, Pa., for appellee.

Before ADAMS, ROSENN, and WEIS, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

Girard Trust Bank ("Bank"), a banking corporation organized under the laws of the Commonwealth of Pennsylvania, entered a judgment by confession on December 15, 1975, in the United States District Court for the Eastern District of Pennsylvania against William H. Martin and F. Louise Martin, his wife, appellants ("Martins"), in the sum of $3,156,940.37 arising out of appellants' alleged default on four promissory notes. The amount confessed consisted of $2,450,000 in unpaid principal, $225,377.20 in purported due interest, since waived, and collection-counsel fees of $481,567.17 on the outstanding claimed principal and the waived interest included with the judgment.

Promptly after learning of the entry of the confessed judgment, appellants filed a petition to open and reduce the judgment alleging, *inter alia,* (1) that the component of the judgment attributable to collection fees was unconscionably high, and (2) that appellants were entitled to a setoff of $364,610.92 in light of other litigation between the parties. The petition also included allegations that the Bank had entered into a fraudulent conspiracy with Stanton Halverson, Maurice B. Turner, and Ernest Garfield, co-obligors on the notes, to defraud and injure appellants to the benefit of the conspirators. The petition further alleged that Halverson, Turner, Garfield, and the Bank had conspired fraudulently to induce appellants to execute the four promissory notes on which judgment was confessed, which notes were also signed by Messrs. Turner, Garfield, Halverson, and their wives as co-obligors. In addition, appellants' petition claimed that Girard breached its fiduciary duty to the Martins in connection with their execution of the four notes.

The Bank did not answer the petition but filed a motion to dismiss asserting that the petition was insufficient on its face and as a matter of law to support the request to open judgment. The district court without written opinion dismissed the petition and at the same time denied appellants' motion for a stay of all proceedings pending an appeal to this court. The court orally stated the basis of its order:

> I view this matter in this action as a straightforward commercial transaction among business people, a transaction in which the defendant husband [Martin] voluntarily entered into as a businessman and, because this is the nature of the transaction, I am not swayed by the argument made by the defendants that there is any breach of fiduciary duty on the part of the plaintiff.

Appellants promptly appealed to this court and at the same time filed a petition with this court for a stay of all proceedings pending appeal. We granted the stay on the condition that appellants post a bond with the district court, a condition which appellants have not fulfilled. Having reviewed the contentions of the parties, we conclude that the district court did not err in its order and we affirm.

I.

The primary issue before this court is whether the district court erred in its determination that appellants' "petition" failed to set forth sufficient facts which provided an adequate basis for opening or vacating the judgment at issue.

The backdrop of this proceeding begins with two valuable tracts of land in Burlington County, New Jersey, originally owned [557 Fed. 388] by the Martins and leased

by them to Medford Nursery, Inc. ("Nursery"). William H. Martin was the sole founder of Nursery and prior to July 25, 1973, its president and sole stockholder; he, his wife, and another person designated as his nominee, were its directors.

According to the petition, William Martin sought a purchaser in the spring and summer of 1973 for all or part of his interest in Nursery. John Franco, a vice president of the Bank, learned of Martin's intention and offered to assist him in securing a purchaser on the payment of a finder's fee of $75,000. Thereafter, Franco introduced Martin to Messrs. Garfield, Halverson, and Turner, with whom the Bank had engaged in prior business transactions. Following negotiations, Garfield, Halverson, and Turner each purchased 25 percent of the issued and outstanding stock of Nursery. Martin received $323,000 in cash plus notes in the principal sum of $157,000. As part of the same transaction, Martin sold the two tracts of land with improvements thereon to Nursery and received $258,000 in cash, and $602,000 note and a purchase money mortgage for the balance of the purchase price.

Subsequent to the consummation of the foregoing transaction, on September 21, 1973, the four principals of Nursery, with Martin serving as president and director, obtained a $2,000,000 loan from the Bank, the proceeds of which were utilized by Nursery for working capital and to repay certain of its outstanding obligations. Each of the principals and their respective wives executed four notes as primary obligors payable to the Bank; Nursery guaranteed the note and gave the Bank a security interest in Nursery's non-realty assets. Each of the notes contained confessions of judgment and each provided that the obligors were jointly and severally liable. The first note became due on September 30, 1974; the remaining three notes were payable on demand. On December 30, 1974, January 8, 1975, and January 20, 1975, the principals of Nursery obtained additional loans from the Bank aggre-

gating $450,000 which were also used in Nursery's operation. On December 15, 1975, upon failure of the Martins and the other obligors to satisfy their obligations, the Bank confessed judgment against the Martins in the sum of $3,156,940.37 on the aforesaid notes.[1]

Much of the petition to open judgment sets forth averments concerning the procedural background of the judgment and the historical facts underlying the transactions leading to the loans at issue and to this litigation. The allegations of fraud and conspiracy between the Bank and Martins' co-obligors on the promissory notes are general and conclusory. The Martins assert that beginning on or about July of 1973, the Bank entered into a conspiracy with *inter alia*, Messrs. Garfield, Halverson, and Turner, William Martin's co-principals in Nursery, "for the purpose of enriching themselves at the expense" of the Martins. In connection with the petition to open judgment, the Martins sought discovery so that they could present a complete record in support of the petition. Although they recognized that the Federal Rules of Civil Procedure do not contain a specific provision governing the opening of judgment by confession, they asserted that Pa.Rule C.P. 2959 expressly recognizes the right of the petitioner to conduct discovery in support of a petition to open judgment.

II.

Essentially it is appellants' contention that a petition to open judgment in the federal court is a pleading and as such it should be viewed in accordance with the liberal

1. The petition avers that affidavits submitted to the district court by counsel for the Bank and one of its officers, reveal that the Bank also has confessed judgment against the co-obligors on the notes, and "all of the joint obligors, with the exception of the defendants herein (the Martins) have made satisfactory arrangement for liquidation of their joint and several and other obligations to the Bank."

spirit and purpose of the Federal Rules of Civil Procedure, notwithstanding that the underlying action and the defenses thereto are predicated on state law. The Martins maintain that their petition to open judgment should be governed by modern [557 F.2d 389] liberal federal notice pleading prevalent in the federal courts, rather than by the traditional requirements of particularity which the district court applied. Specifically, the Martins urge that the petition should be considered under the notice pleading standards of Rule 8 of Fed.R.Civ.P., that the standards therein governing affirmative defenses in an answer to a complaint "must also apply to affirmative defenses set forth in a petition to [open] a judgment," and that the federal rules grant the right to conduct full discovery and pretrial proceedings prior to the determination of their petition.

The Bank, on the other hand, contends that Martins' petition is not a "pleading" but is in fact a motion filed pursuant to Rule 60(b),[2] Fed.R.Civ.P. and, as such, is governed by the legal standards and requirements of that rule, not the notice pleading standards of Rule 8. The Bank argues that the requirement of Rule 7(b)(1) that a motion "shall state with particularity the grounds therefor" applies with full force to the Martins' petition. Furthermore, avers

2. Rule 60(b), Fed.R.Civ.P., provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

the Bank, even accepting *arguendo* Martins' position that notice pleading standards are applicable to their "Petition," Rule 9(b), Fed.R.Civ.P., specifies "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, according to the Bank, Martins' petition is deficient under the federal rules whether it is treated as a motion or as a pleading.

The Martins rely principally on *D. H. Overmyer Co. v. Frick Corp.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), claiming that the Court there held that "the burdens of asserting a defense in order to open a judgment could not be more arduous than the burden of asserting a defense to a regular complaint." *Overmyer* involved a constitutional challenge to a note containing a confession of judgment on the ground that it violated the Due Process Clause of the fourteenth amendment. In commenting on its holding that the cognovit clause was not *per se* unconstitutional, the Court observed that the maker of a note with a cognovit clause was not thereby rendered defenseless since a court in Ohio where the judgment was entered could vacate the judgment upon showing of a valid defense. While *Overmyer* thus seems to require that there be some procedure by which a debtor against whom judgment is confessed may test the validity of the judgment against him, the case does not address the standards and the burden a petitioner must meet in order to set aside or open a judgment of the court.

The Martins do not attack the constitutionality of the cognovit clause. They only seek to open and vacate the judgment and plainly aver in paragraph 1 of their "Petition" that the petition is presented pursuant to Rule 60(b), F.R.Civ.P., and Pennsylvania Rule 2959, Pa.Rules of Civil Procedure, pertaining to the opening of judgments and that it involves the inherent and supervisory powers of the Federal Courts with respect to judgments entered on their dockets. In the district court, however, counsel for Martins

did not urge Rule 60(b) but informed the court that "we are relying on Rule 8 of the Federal Rules of Civil Procedure."

Notwithstanding appellants' belated attempt to recharacterize their petition as a "pleading," we hold that a petition to open or vacate a judgment entered in the federal courts is procedurally governed by Rule 60, F.R. Civ.P. Our examination of the Federal Rules convinces us both that Rule [557 F.2d at 390] 60 applies by its terms to this type of procedure and that the rules relating to "pleading" do not contemplate this kind of petition. Viewing the petition as a motion under Rule 60, Rule7(b) requires that the circumstances constituting the grounds for the fraud or conspiracy must be alleged with particularity. The requirements of Rules 7(b) and 9(b) that the circumstances constituting the fraud be stated with particularity merely restate the long standing rule at common law. *See Chamberlain Machine Works v. U.S.*, 270 U.S. 347, 349, 46 S.Ct. 225, 70 L.Ed. 619 (1926); *U. S. v. Throckmorton*, 98 U.S. 61, 64, 25 L.Ed. 93 (1878). A petition to open or vacate a judgment of the court on the ground of fraud, therefore, should "state distinctly the particular acts of fraud and coercion relied on, specifying by whom and in what manner they perpetrate, with such definiteness and reasonable certainty that the court might see that, if proved, they would warrant the setting aside of the [judgment]." *Chamberlain Machine Works v. U. S., supra*, 270 U.S. at 349, 46 S.Ct. at 226.

An analysis of the petition in the instant proceeding reveals that the allegations of fraud are at once overly general, obscure, and conclusory. By interjecting innumerable references to undisputed facts pertaining to the sales transaction and loan, the Martins have attempted to give substance to their general allegations of conspiracy. Those allegations are not supported by averments of facts which show or from which reasonable inferences can be

drawn that the loan to the Martins and their co-obligors formed the basis for a fraudulent conspiracy between the Bank, Garfield, Halverson, and Turner to enrich themselves at the Martins' expense. The only allegation of fraud in the petition which approaches any degree of specificity is the averment that the conspirators had an understanding since before September 1973 that in the event of a default on any joint notes of the purchasers and Martin, the Bank would look solely to the Martins for payment and would execute solely on the Martins' assets forgiving the purchasers of the notes. The Martins concede that they executed the notes together with Garfield, Halverson, and Turner and that under the terms of the notes, each obligor was jointly and severally liable. It is also conceded that the obligors have refused to make payment after demand and no facts are set forth showing fraud in the execution of the notes or loans. Furthermore, the charge that the Bank determined to relieve certain of the co-obligors cannot prevail as defense as a matter of law. We discern nothing after carefully reviewing the allegations in the petition that would lead to the conclusion that the Bank was a party to any fraudulent conspiracy. The chronology reveals instead that this was an ordinary bank loan and that the Martins' distressing situation "is one brought about largely by [their] own misfortune and failure or inability to pay." *D. H. Overmyer Co. v. Frick Co., supra,* 405 U.S. at 182, 92 S.Ct. at 781.

A petition to vacate a judgment is addressed to the sound legal discretion of the court and its disposition will not be disturbed except for an abuse of discretion. *International Nikoh Corp. v. H. K. Porter Co.,* 374 F.2d 82 (7th Cir. 1967); *Douglass v. Pugh,* 287 F.2d 500 (6th Cir. 1961); *Independence Lead Mines Co. v. Kingsbury,* 175 F.2d 983, 988 (9th Cir.), *cert. denied,* 338 U.S. 900, 70 S.Ct. 249, 94 L.Ed. 554 (1949). We find no such abuse here. In the circumstances of this proceeding, we also find

III.

no abuse of discretion in the district court's refusal to allow discovery or amendment of the petition.[3]

The Martins also complain in their petition that the collection attorneys' fees charged in the notes are exorbitant and [557 F.2d 391] that petitioners are also entitled to credits on the judgment to reflect a forgiveness of the pre-1976 unpaid interest on the notes which was extended to each of the co-obligors by the Bank subsequent to the entry of judgment. We need not decide these issues since the Bank does not contest Martins' contention that the judgment may be subject to reduction and modification as a result of developments following the entry of judgment, including a future determination at an appropriate time as to the proper allowance for collection fees.[4]

---

3. After the district court announced its decision to grant the motion to dismiss the petition to open judgment, counsel for the Martins sought to amend the petition. The district court refused to grant permission not merely because of the insufficiencies of the averments in the petition even taking them as true, but after probing deeply at oral argument into the presence of any fraud, it was satisfied that the amendment would be futile. Moreover, the court was concerned with the great delay and the equities which "certainly lie with the plaintiff here." These reasons apparently also influenced the court's decision to deny discovery. This is not to say that discovery should not be permitted under appropriate circumstances.

4. The Bank in its brief with this court represents that it "would not object or contest (1) a credit on the judgment in the amount of $225,373.20 to reflect a forgiveness of pre-1976 unpaid interest on the notes which was extended to each of the co-obligors by Girard subsequent to the entry of the judgment; (2) a credit on the judgment in the amount of $348,147.49 to reflect the settlement of certain litigation involving appellant Martin subsequent to the entry of the judgment." We expect that the district court will hold the bank to these representations.

IV.

The order of the district court dismissing appellants' petition to open and vacate the judgment will be affirmed, without prejudice to the Martins to move for credits on the judgment to reflect the forgiveness of interest, settlement of certain litigation, and any excess attorneys' fees as may be determined by the district court.

APPENDIX F.
COURT OF APPEALS ORDER OF JULY 20, 1977, DENYING REHEARING

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2471

WILLIAM H. MARTIN, and
F. LOUISE MARTIN, *h/w*,
Appellants

v.

GIRARD TRUST BANK,
Appellee

Sur Petition For Rehearing

Present: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Rosenn, Hunter, and Garth, *Circuit Judges*.

The petition for rehearing filed by WILLIAM H. MARTIN, and F. LOUISE MARTIN, *h/w*, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Max Rosenn
Judge

Dated: July 20, 1977

APPENDIX G.

CONSTITUTIONAL & STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment VII

[696] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be reserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * *

FEDERAL RULES OF CIVIL PROCEDURE
for the
United States District Court

* * *

Rule 1. Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

* * *

Rule 7. Pleadings Allowed; Form of Motions.

(b) MOTIONS AND OTHER PAPERS.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

* * *

Rule 9. Pleading Special Matters.

(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

* * *

Rule 60. Relief From Judgment or Order.

* * *

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have

been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * *

Rule 84. Forms.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-579

WILLIAM A. MARTIN AND F. LOUISE MARTIN, his wife,
Petitioners,

v.

GIRARD TRUST BANK,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REASONS FOR DENYING THE WRIT

The instant Petition distorts and grossly misconstrues a decision of the Third Circuit Court of Appeals in an attempt to convince this Court that that decision, although consistent with the rulings of every other federal appellate and district court that has spoken to the issue, as well as with the express provisions of the Federal Rules of Civil Procedure themselves, warrants review by this Court. The Third Circuit specifically held that a litigant who seeks relief from a judgment on the basis of allegations of fraud pursuant to Rule 60(b), Fed. R. Civ. P., must allege the fraud with particularity and, conversely, may not obtain the relief sought on the basis of general or conclusory allegations. That holding, furthermore, was

clearly limited in its application to Rule 60(b) proceedings and the particular facts and circumstances of the appeal. Nevertheless, petitioners boldly and incorrectly assert that the lower court's ruling is not so limited, but instead establishes standards which are applicable to every conceivable type of motion filed in the federal court system, regardless of its nature or the context out of which it arises. Even the broadest interpretation of the decision below would not support such a position. In addition, and despite petitioners' assertions to the contrary, no conflict exists between the holding of the Court of Appeals and any prior decision of this Court on the subject of judgments by confession, including *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174 (1972), for both the Third Circuit and the District Court below unequivocally found that petitioners' allegations of fraud were insufficient even to raise a question for a jury, the most minimal standard imposed upon a litigant at any stage of a proceeding. Accordingly, the instant Petition must be denied.

A. The Standards Enunciated by the Court of Appeals Are Applicable Only to Motions Alleging Fraud as a Ground for Relief Under Rule 60(b)(3), Fed. R. Civ. P., and Do Not Establish a Standard of Particularity for Any Other Federal Court Motions.

The primary thrust of petitioners' argument is their assertion that the Court of Appeals has, in its opinion below, embraced "the *common law* rule of 'particularity' under the broad aegis of Rule 7(b)(1), Fed. R. Civ. P.," applied that standard to motion practice generally, and, thereby, adopted a standard which "threatens motion practice nationwide at every stage of litigation." (Petition, at 12). Respondent is confident that even a cursory review of the appellate court's decision will quickly reveal the incorrectness of petitioners' position.

This case involves petitioners' motion for relief from

judgment pursuant to Rule 60(b)(3), Fed. R. Civ. P. The grounds asserted by petitioners for the requested relief were set forth in numerous allegations charging, *inter alia*, a fraudulent conspiracy involving respondent and others. The Court of Appeals held that, despite the abundance of allegata in petitioners' papers, the assertions of fraud were "at once overly general, obscure, and conclusory." (App. 35a). The court went on to state:

> "Those allegations [of fraud] are not supported by averments of facts *which show or from which reasonable inferences can be drawn* that the loan to the Martins and their co-obligors formed the basis for a fraudulent conspiracy. . . ." (App. 35a-36a) (emphasis added).

It is apparent from its opinion that the appellate court was acutely aware of the fact that the sole issue before it was the sufficiency of a Rule 60(b)(3) motion for relief from judgment premised on alleged fraudulent conduct. And it is equally clear that the court's determination that the motion before it was subject to the particularity requirements of Rule 7(b)(1), in addition to being correct as a matter of law, enunciated a pleading standard limited to Rule 60(b)(3) motions and as applied to the specific facts of this case.

Petitioners now attempt to obtain a writ of certiorari from this Court by suggesting that the standards imposed by the appellate court, in a Rule 60(b)(3) context, have been made applicable, by the court's decision, to every other motion, whatever its nature, which is filed in a federal court proceeding. Such an argument utterly ignores both the clear intent and the express holding of the lower court. Judge Rosenn, writing for a unanimous panel, could not have made the court's position any clearer:

> "Viewing the petition as a motion under Rule 60(b), Rule 7(b) requires that the circumstances

constituting the grounds for the fraud or conspiracy must be alleged with particularity." (App. 35a)

Nothing in the Court of Appeals opinion could possibly lead one reasonably to conclude that the same standards of particularity applicable to the assertion of fraud under Rule 60(b)(3) are to be blindly applied in like manner to all other motions filed in the federal courts. What the appellate court did recognize was that before assertions of fraud will be permitted to disturb a final judgment in the federal courts, those contentions must be supported by some degree of factual substance. In this case, the court made an independent review of the petitioners' motion and found, as did the district court, that both the requisite factual substance and a sufficient legal claim were totally lacking.

> "We discern nothing after carefully reviewing the allegations in the petition that would lead to the conclusion that the Bank [appellee] was a party to any fraudulent conspiracy. The chronology reveals instead that the [appellants]' distressing situation 'is one brought about largely by [their] own misfortunes and failure or inability to pay.' *D.H. Overmyer Co. v. Frick Co., supra,* 405 U.S. [174] at 182, 9 S.Ct. [775] at 781." (App. 36a)

On the basis of its findings, the court affirmed the district court's dismissal of petitioners' motion.

The decision of the Court of Appeals is properly limited, enunciating standards applicable solely to motions filed pursuant to Rule 60(b)(3) which allege fraudulent conduct as a ground for relief. As such, the opinion below does not impact upon the standards of particularity applicable to any other type of federal motion, and, therefore, does not warrant review by this Court.

B. The Third Circuit's Interpretation of the Requirements of Rules 7(b)(1), 9(b), and 60(b), Fed.R.Civ.P., Is Consistent with the Holdings of Every Other Federal Court that Has Passed on this Issue.

A reading of the petitioners' brief would lead one to conclude that the decision of the Third Circuit somehow establishes a novel and unprecedented pleading standard for the federal courts. However, as this Court is surely aware, the requirements that allegations of fraud in a complaint or answer be set forth with particularity pursuant to Rule 9(b), Fed. R. Civ. P., and that a motion made pursuant to Rule 7(b)(1), Fed. R. Civ. P., set forth the grounds upon which it is based with similar particularity, especially when allegations of fraud are asserted, have been upheld by every federal appellate and district court that has passed on the issue. *E.g., Segan v. Dreyfus Corp.,* 513 F.2d 695 (2d Cir. 1975); *Tomera v. Galt,* 511 F.2d 504 (7th Cir. 1975); *Felton v. Walston & Co., Inc.,* 508 F.2d 577 (2d Cir. 1974); *Segal v. Gordon,* 467 F.2d 602 (2d Cir. 1972); *Jackson v. Alexander,* 465 F.2d 1389 (10th Cir. 1972); *Douglas v. Union Carbide Corp.,* 311 F.2d 182, 185 (4th Cir. 1962); *Upper West Fork River Watershed Assoc. v. Corps of Engineers, United States Army,* 414 F. Supp. 908, 918 (N.D. W.Va. 1976); *Bartholomew v. Port,* 309 F. Supp. 1340 (E.D. Wisc. 1970); *South v. United States,* 40 F.R.D. 374 (N.D. Miss. 1966); *United States v. 64.88 Acres of Land, etc.,* 25 F.R.D. 88 (W.D. Pa. 1960); *Roebling Securities Corp. v. United States,* 176 F. Supp. 844 (D.N.J. 1959); *Sachs v. Ohio National Life Insurance Co.,* 2 F.R.D. 348 (N.D. Ill. 1942); *Steingut v. National City Bank of New York,* 36 F.Supp. 486, 487 (E.D. N.Y. 1941).

These same pleading requirements have been carried over and made applicable to motions filed pursuant to Rule 60(b). *E.g., Stebbins v. Keystone Insurance Co.,* 481 F.2d 501, 511 (D.C. Cir. 1973); *Aetna Casualty & Surety Co. v. Abbott,* 130 F.2d 40 (4th Cir. 1942); *United States v. $3,216.59,* 41 F.R.D. 433 (D.S.C. 1967).

In addition, Rule 60 itself requires that a motion for relief filed pursuant to its provisions, "must clearly establish the grounds therefor to the satisfaction of the district court." *Virgin Islands National Bank v. Tyson*, 506 F.2d 802, 804 (3d Cir. 1974), citing *Federal Deposit Insurance Corp. v. Aiker*, 234 F.2d 113, 116-17 (3d Cir. 1956). 7 J. Moore, FEDERAL PRACTICE, ¶60.28[3], at 407 (Supp. 1976) (citing cases). *See Westerly Electronics Corp. v. Walter Kidde & Co., Inc.*, 367 F.2d 269 (2d Cir. 1966); *DiVito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 938-39 (7th Cir. 1966).

It is apparent that the holding of the Court of Appeals in this case is consistent with the law as expressly set forth in the Federal Rules of Civil Procedure and as uniformly applied by federal courts throughout the country. Accordingly, the issues raised by petitioners have no merit, nor do they present a proper or important question for review by this Court.

C. The Court of Appeals Correctly Held that Petitioners' Motion Was Deficient on the Alternative Ground that It Failed to State Any Claim Upon Which Relief Could Be Granted; on that Basis, It Properly Affirmed the District Court's Refusal to Permit Discovery or Amendment of that Motion.

The decision of the Third Circuit was premised upon two separate and distinct grounds: first, as previously discussed, that the allegations of fraud in petitioners' motion were not set forth with particularity pursuant to Rules 7(b)(1) and 9(b), Fed. R. Civ. P., and second, that the motion itself was insufficient as a matter of law to justify the relief sought by petitioners, even if all of the factual allegations asserted in that motion were ultimately shown to be true. (App. 35a-36a) On this second ground alone, dismissal of petitioners' motion to open judgment was justified.

Any litigant who seeks affirmative relief, at any stage in a proceeding and regardless of the type of relief sought, must initially present to the court a legally sufficient basis for the relief requested. This requirement is the most minimal standard imposed by the Federal Rules of Civil Procedure. Rule 8(a)(2), Fed. R. Civ. P. *See, e.g., Avins v. Mangum*, 450 F.2d 932 (2d Cir. 1971); *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465 (5th Cir. 1968); *Car-Two, Inc. v. City of Dayton*, 357 F.2d 921 (6th Cir. 1966); *Beeler v. United States*, 338 F.2d 687 (3d Cir. 1964); *Barnes v. American Broadcasting Co.*, 259 F.2d 858 (7th Cir. 1958).

In this instance, petitioners sought such affirmative relief in the district court by way of a Rule 60(b) motion to open judgment. The district court, quite properly, required petitioners, at the time they moved for that relief, to set forth in their papers the requisite legal basis for opening the judgment. Even the standards outlined by Mr. Justice Douglas in his concurring opinion in *D.H. Overmyer Co., Inc. of Ohio v. Frick Co., supra*, 405 U.S. at 188, *et seq.*, upon which petitioners' place primary reliance, require such a showing:

> "The fact that a trial judge is dutybound to vacate judgments obtained through cognivit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate." *Id.* at 190

Here, the District Court found that, *even accepting as true each of the allegations set forth by petitioners*, a legally sufficient basis for the relief sought was not presented, no questions for determination by a jury were raised, and the motion to open, as a result, was vulnerable to a motion to dismiss (App. 30a). The Court of Appeals agreed and unequivocally concluded that even the one allegation in

the petitioners' motion which approached any degree of specificity "cannot prevail as a defense as a matter of law." (App. 36a). Thus, even accepting the standard enunciated by Mr. Justice Douglas in *Overmyer* that a judgment by confession must be opened if "the debtor poses a jury question, that is, if his evidence would have been sufficient to prevent a directed verdict against him," *id.* at 189-90, in this instance both courts concluded, after independent analysis of petitioners' motion, that petitioners could not prevail as a matter of law on the basis of the allegations set forth in their motion to open judgment, and that a dismissal of that motion was thereby required.

For this same reason, the lower courts were justified in refusing to permit petitioners to conduct discovery on their motion. It should be obvious that once the allegations in a pleading are found to be legally insufficient, the taking of discovery to support those allegations becomes a futile act, burdening both other litigants and the court, thus, turning the discovery process into a "fishing expedition" in the truest sense. Furthermore, any party who seeks affirmative relief from a federal court is required to have in his possession, at the time he files his initial pleading, good grounds to support the allegations of that pleading. *See, e.g.*, Rule 11, Fed. R. Civ. P.; *Heart Disease Research Foundation v. General Motors Corp.*, 15 F.R. Serv. 2d 1517 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); *Competitive Associates v. Fire Fly Enterprises, Inc.*, CCH Fed. Sec. L. Rep. ¶93,721 (S.D.N.Y. 1972); *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961); *American Automobile Assoc. v. Rothman*, 101 F. Supp. 193 (E.D.N.Y. 1951). The appellate court concluded in this case, that the petitioners' allegations were "not supported by averments of facts which show or from which reasonable inferences can be drawn" that any fraudulent conspiracy existed (App. 35a-36a). To allow petitioners to conduct discovery in order to substantiate those inadequate

allegations would be to flout both the letter and spirit of the Federal Rules of Civil Procedure.

In this case, the legal sufficiency of the averments of appellants' "Petition" was properly tested by means of a motion to dismiss, 7 J. Moore, FEDERAL PRACTICE ¶60.28[3] at 409 (Supp. 1976); *see Ackermann v. United States*, 340 U.S. 193 (1950), and found to be wanting. Thus, the dismissal was proper and the denial of discovery was eminently just.

Additionally, any proceeding for relief from judgment pursuant to Rule 60, Fed. R. Civ. P., is addressed to the sound, legal discretion of the District Court, in light of all the facts then before it and any equitable considerations which are applicable among the respective parties. *E.g., Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114 (2d Cir. 1962); *Delzona Corp. v. Sacks*, 265 F.2d 157 (3d Cir. 1959); *Parker v. Checker Taxi Co.*, 238 F.2d 241 (7th Cir. 1956); 7 J. Moore, FEDERAL PRACTICE, ¶60.19 at 227, *et seq.*, (Supp. 1976) (citing cases). On this basis too, and in light of the facts set forth in petitioners' own pleadings, the correctness of the decisions of the lower courts to bar petitioners from taking discovery and to terminate the proceedings is even more evident.

The relevant facts, as alleged in petitioners' motion, indicate that petitioner W. Martin was a sophisticated and and successful businessman as of 1973 (App. 18a); he himself sought respondent's assistance and was introduced, at his request, to the other purchasers by respondent (App. 11a-12a); he was involved in the negotiations leading up to the sale of Medford stock and in the decision to obtain additional financing from respondent for the use of Medford (App. 12a-14a); he voluntarily and knowingly signed the joint and several promissory notes at issue in return for which Medford, in which he held a 25% interest, received from respondent $2,450,000 (App. 12a-14a); he was aware, at the time of the stock sale, that one of the

purchasers had given a power of attorney to respondent (App. 12a, 15a); and, most significant of all, petitioner W. Martin was the President and chief operating officer of Medford for the 18 months following the transactions with respondent and until February of 1975 (App. 13a). In other words, solely on the basis of the facts presented in petitioners' own motion, no one could conceivably have been in any better position to have knowledge of the facts relating to the alleged "fraudulent conspiracy" than was petitioner W. Martin himself. Given petitioners' close and continuing involvement in Medford and in Medford's transactions with respondent, given W. Martin's continuing right of access, as a director of Medford, to Medford's books and records, and given W. Martin's business experience and purported acumen, the lower courts were perfectly justified in concluding that further discovery would have been futile and that respondent should not be burdened with additional expense and further delay in the collection of its judgment. Furthermore, since the crux of petitioners' "fraudulent conspiracy" allegation: that respondent was improperly looking to them alone for collection of the joint and several notes executed by them, is a proposition which cannot succeed, on any legal or factual basis and regardless of how many discovery depositions petitioners are permitted to conduct, the lower courts, beyond question, exercised their discretion in a most judicious manner in their denial of discovery.

In the same vein, the lower courts properly rejected petitioners' contention that they should be allowed to amend their motion to open judgment. As noted by the Court of Appeals, petitioners were afforded repeated opportunities to amend their petition at oral argument in response to continued questioning by the district court as to the existence of any facts which would support their motion. Given petitioners' inability to provide such facts, the district court concluded that any amendment would be

futile (App. 37a, n.3), and the Court of Appeals found no abuse of discretion by the district court in its refusal to allow amendment of the motion.[1] (App. 36a-37a).

In holding that petitioners' motion was insufficient as a matter of law and that further proceedings should not be permitted, given both the futility of such proceedings and the delay and prejudice which such extended proceedings would have had upon the rights of respondent, the lower courts acted upon the most fundamental principles of federal practice. Inherent in their decisions was the recognition that before a valid federal judgment is disturbed—whether it results from confession proceedings or after a full trial on the merits—a legal and factual claim of some minimal merit, at the very least, must be presented to the court. If even this modest standard is disregarded by the courts, the entire concept of "final judgments" would be destroyed. The judgment entered by confession in this case is a proper and valid judgment, authorized by the laws of the Commonwealth of Pennsylvania, and is, therefore, entitled to be protected from debtors who seek to upset that judgment and delay its enforcement without having any basis whatsoever for the relief sought by them. And this principle is particularly applicable to the instant matter where all parties involved were sophisticated businessmen who knowingly and intelligently negotiated and entered into the transactions at issue. Both the district court and the Third Circuit found that this case involved "a straightforward commercial transaction among business people" and that "there [was no] breach of fiduciary duty on the part of the plaintiff [respondent]." (App. 30a, 36a). None

1. Additionally, petitioners were accorded two months between the filing of respondents' motion to dismiss and the hearing on that motion to amend their motion to open judgment or to present affidavits or evidence in support of that motion to the court. (App. 1a-2a). Petitioners did not avail themselves of this opportunity, thereby confirming that they had no facts in their possession upon which a valid cause of action could be premised.

of the procedural, statutory or constitutional rights of the petitioners were prejudiced in any manner by the decisions of the district and appellate courts, those decisions were clearly correct, and accordingly, they should not be disturbed by this Court.

D. Petitioners' Constitutional Rights Have Been Safeguarded Throughout this Proceeding, and Petitioners' Assertions to the Contrary Are Groundless.

The constitutional issues which have been so adroitly formulated and injected into this proceeding are, at best, frivolous and obscure, and, at worst, improperly presented to this Court.

It should first be emphasized that the constitutionality of Pennsylvania's confession of judgment procedure, either on a *per se* basis or as applied in this case, is not an issue in this appeal, as is suggested by petitioners (Petition at 28-29). No constitutional challenges to the cognovit procedure were advanced below and, therefore, such assertions may not be presented to this Court. *E.g., United States v. New York Telephone Co.*, 326 U.S. 638 (1946).

Second, the only due process issue involved in this case is whether the proceedings below complied with the applicable procedural law, as established by the provisions of the Federal Rules of Civil Procedure. In this instance, petitioners were afforded a full hearing before the district court and had the opportunity to present whatever evidence they possessed in support of their motion for relief. All of the relevant issues were fully briefed and argued to both the district and appellate courts, and petitioners have availed themselves of their right to appeal to this Court. As is discussed at length in preceding sections of this brief, the courts below, simply stated, applied the proper legal standards in making their determination in this matter as established by the Federal Rules and, as a result, all of

petitioners' due process rights have been carefully preserved by these proceedings, despite their continual protestations to the contrary.[2]

Finally, petitioners' right to trial by jury has clearly not been denied. As has been discussed at length above, both the district and appellate courts found that petitioners did not set forth, in their motion to open judgment, a cause of action upon which relief could be granted. On that basis, the motion was dismissed, a procedure which may be employed by a court at various points in a proceeding. *E.g.*, Rule 11, Rule 12(b)(6); Rule 41(b)(c); and Rule 50, Fed. R. Civ. P. To suggest that a dismissal of a pleading for failure to state a claim constitutes a denial of the right to trial by jury, although a most imaginative argument, is unsupportable as a matter of law.

Petitioners' constitutional arguments are as ephemeral and obscure as was their original motion to open judgment filed in the district court. As their position is plainly without merit, it does not require further discussion, and, likewise, does not deserve consideration by this Court.

CONCLUSION

Petitioners ask this Court to review a decision of the Third Circuit Court of Appeals which is consistent with the procedural standards employed and applied by federal courts throughout the country and which affirmed a dis-

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2. Petitioners would have this Court inquire into the substantive basis of their claim and have peppered their brief with repeated references to and colorful descriptions of the alleged fraudulent conspiracy. However, the only issues properly before this Court relate to the procedural standards relied upon by the Court of Appeals and any constitutional defect which may have resulted from their application. Inquiry into the substantive basis of petitioners' position and the law applicable thereto is premature and should first be made by the lower court should these proceedings be permitted to continue.

trict court's proper exercise of the discretionary powers vested in it by Rule 60(b), Fed. R. Civ. P., in refusing to open a valid federal judgment. Clearly, this case presents no issue of even transitory significance, and, for all of the reasons noted above, does not meet any of the criterion historically considered to be of sufficient importance to warrant review by this Court. Therefore, a Writ of Certiorari to review the Judgment Order of the Third Circuit should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-579

WILLIAM H. MARTIN, AND F. LOUISE MARTIN, HIS WIFE,
Petitioners

v.

GIRARD TRUST BANK, *Respondent*

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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October Term, 1977

No. 77-579

William H. Martin, and F. Louise Martin, his wife,
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The cornerstone of Respondent's opposition to certiorari is the mistaken idea that the opinion below can somehow be limited to a construction of Rule 60(b) (3), Fed. R. Civ. P. (Brief In Opposition at 3-4). Petitioners would also like to limit the scope of the error below as much as possible, but the plain language of the opinion simply admits of no such limited reading. "Viewing the petition as a mo-

tion under Rule 60,"[1] the Court of Appeals held, "*Rule 7 (b) requires* that the circumstances constituting the fraud must be alleged with particularity." 557 F.2d at 390; App. 35a.[2] The next sentence of the holding below is equally emphatic in its reliance on Rules 7(b) and 9(b), Fed. R. Civ. P. "*The requirements of Rules 7(b) and 9(b)* that the circumstances be stated with particularity merely restate the long standing rule at common law." *Id.* Nothing in Rule 60(b) contains a "particularity" requirement of any kind and so, of course, the court below did *not* hold that "Rule 60(b) requires . . .," or that "the requirements of Rule 60(b) merely restate the common law rule." Conspicuously absent from the list of Rules whose "requirements" are relied on is Rule 60(b) (3), to which respondent contends the holding below is somehow limited. Rather, the only reason particularity was required at all is that a motion for relief from judgment falls within the requirements of Rule 7(b)(1), Fed. R. Civ. P. This rule governs federal motion practice across the board.[3]

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1. The respondent's quotation of this part of the holding below as referring to Rule "60(*b*)" is mistaken. Compare Brief In Opposition at 3, last line, with 557 F.2d at 390 (App. 35a). The opinion below is not actually that specific; it refers only to "Rule 60" generally. This is but one indication of the caution with which respondent's Brief in Opposition should be addressed. Others are provided by respondent's suggestions as to the facts. For example, respondent claims that Martin "sought respondent's assistance and was introduced, at his request, to the other purchasers by respondent (App. 11a-12a)." Brief in Opposition at 9. The reference supports only the proposition that Martin was introduced to the other purchasers by respondent but does not support the idea that Martin "sought" respondents assistance or that the introduction was "at his [Martin's] request."

2. All emphasis is supplied unless otherwise indicated.

3. Rule 9(b), also relied on, governs federal pleading of fraud and mistake generally. Instead of limiting the holdings below, this reliance actually broadens that holding.

Moreover, the court below never once even mentioned Rule 60(b) (3) specifically. In its most particular moment, the opinion below refers only to Rule 60(b), generally. (App. 33a, 34a, 35a). It is not a little difficult to see exactly how a particular subpart of just one rule can be thought to form the basis of a holding without a single specific reference. It is much more difficult to see how that holding could be confined to that particular subpart without even so much as mentioning it once. Thus, the decision of the Court of Appeals simply is not restricted to Rule 60(b) (3), Fed. R. Civ. P. Rather, both the result reached below and the rationale of the opinion rest on the broad command of Rules 7(b) (1) and 9(b), Fed. R. Civ. P., governing federal motion and pleading practice generally.

Furthermore, the concerns for finality set out by respondent[4] are not even obliquely referred to anywhere in the opinion below.[5] It is enormously difficult to understand just how such unarticulated concerns for finality could conceivably form the basis of the holding below or limit its application to situations involving that entirely

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4. Brief In Opposition at 4 and 11.

5. The view of finality urged by respondent seems somewhat at odds with the "pragmatic", "practical" approach to finality embraced by this Court in *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) and in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *see also* 15 Wright, Miller & Cooper, Federal Practice & Procedure §3913 (1976). In part, this "pragmatic" approach to finality earlier led those same professors to counsel: 'There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits. (Footnote omitted.)." 11 Wright & Miller, *supra*, §2857 at 160. To the same effect is *id.* §2852 at 143. All of this the court below ignored in embracing a *single* test for relief from any judgment, a rule which respondent never seeks to justify but rather seems to recognize. (See Brief In Opposition at 13).

unmentioned policy. Since these concerns do not confine the decision below either, it thus seems only too clear that the threat to federal motion and pleading practice overall is dangerously real.

Respondent's Brief In Opposition vividly demonstrates the confusion created by the decision below. At page 3, Respondent states that the Court of Appeals ". . . enunciated a *pleading* standard limited to Rule 60(b) (3) *motions* . . .".[6] It seems respondent either now concedes that a *pleading* standard should have been applied to what, substantively, was a pleading, or respondent is simply suffering from the confusion created by the Court of Appeals' decision. It is plain, however, that applying such a *pleading* standard is what the Court of Appeals expressly refused to do. 557 F.2d at 389-390 (App. 35a). Thus, the need for authoritative resolution of what are—and what are not—the proper standards for motions for relief from judgment is clear.

Respondent next contends that the decision below is in accordance with other decisions nationwide. Nothing could be further from the truth. Not a single decision in the litany of cases cited by respondent in its Brief In Opposition (at 5) formulated the particularity requirement of either Rule 7(b) (1) or of Rule 9(b) as "merely a restatement of the long standing rule at common law", as did the court below. 557 F.2d at 390 (App. 35a). Rather, those cases actually stand only for the proposition that Rule 7(b) and Rule 9(b), Fed. R. Civ. P., do have particularity requirements, a proposition no one denies.[7] What is disturb-

6. Brief In Opposition at 3.

7. Each case, briefly sketched, in fact, held: *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975) (Complaint for violations of securities laws not sufficiently particular under Rule 9(b), Fed. R. Civ. P.); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975) (Complaint for violations of securities law *held sufficiently particular* under Rule 9(b), Fed. R. Civ. P.); *Felton v. Walston & Co., Inc.*, 508

ing is the formulation of those "particularity" requirements as mere restatements of the common law. By thus reading an earlier era's law into such broad provisions, important

F.2d 577 (2d Cir. 1974) (Complaint for violation of securities laws was not sufficiently particular under Rule 9(b), Fed. R. Civ. P.); *Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972) (Another securities complaint not sufficiently particular); *Jackson v. Alexander*, 465 F.2d 1389 (10th Cir. 1972) (Under Rule 9(b), Fed. R. Civ. P., averments of fraud in a complaint cannot be at odds with documents attached to the complaint; motion to dismiss granted.); *Douglas v. Union Carbide*, 311 F.2d 182, 185 (4th Cir. 1962) (Motion for a new trial *was* sufficiently particular under Rule 7(b), Fed. R. Civ. P. when made orally in court and later reduced to writing); *Upper West Fork Rivers Watershed Assoc. v. U.S. Corp. of Engineers*, 414 F. Supp. 908, 918 (N.D. W.Va. 1976) (Motion filed in opposition to other party's motion to dismiss was not sufficiently 'particular"; summary judgment, under Rule 56, Fed. R. Civ. P., was granted.); *Bartholomew v. Port*, 309 F. Supp. 1340 (E. D. Wis. 1970) (Motion to dismiss, after opportunity to amend, did not state grounds with particularity under Rule 7(b) (1), Fed. R. Civ. P.); *South v. United States*, 40 F.R.D. 374 (N. D. Miss. 1966) (Motion to strike a party defective for failure to comply with the particularity requirement of Rule 7(b)(1), Fed. R. Civ. P.); *United States v. 64.88 Acres of Land etc.*, 25 F.R.D. 88 (W. D. Pa. 1960) (Motion for new trial was too general and therefor motion was denied under Rule 7(b), Fed. R. Civ. P.); *Roebling Securities Corp. v. United States*, 176 F. Supp. 844 (D.N.J. 1959) (Motion made for the production of documents was denied under Rule 7(b)(1), Fed. R. Civ. P.; opportunity to amend was provided.); *Sachs v. Ohio Nat. Life Ins. Co.*, 2 F.R.D. 348 (N. D. Ill. 1942) (Motion to strike answer was intentionally lacking in particularity and was therefore denied under Rule 7(b) (1), Fed. R. Civ. P.); *Steingut v. National City Bank of N.Y.*, 36 F. Supp. 486, 487 (E.D.N.Y. 1941) (Motion to remand proceedings to state court must meet particularity requirements under Rule 7, Fed. R. Civ. P.); *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501, 511 (D. C. Cir. 1973) (Motion for relief from judgment on grounds of fraud contained in affidavits failed to specify what "portions of these documents had been altered or falsified", 481 F.2d at 511.); *Aetna Casualty & Surety Co. v. Abbott*, 130 F.2d 40 (4th Cir. 1942) (Relied on distinction between extrinsic and intrinsic fraud, 130 F.2d at 43-44, rejected by Rule 60(b)(3) in

reforms of the Federal Rule of Civil Procedure are significantly imperiled.[8]

Far from being in accord with decisions nationwide, the decision below is almost exactly what the Ninth Circuit has rejected as an abuse of discretion. In *Butner v. Neustadter*, 324 F.2d 783 (9th Cir. 1963), defendant-appellant had signed a promissory note. Judgment was entered by default and a motion to set aside this judgment under Rule 60(b) (3), Fed. R. Civ. P., followed. In considering that motion, the *Butner* court first examined the California practice from which Rule 60(b), Fed. R. Civ. P., evolved:[9]

> " 'The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.' "
>
> " 'It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in con-

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the 1948 Amendment. See Advisory Committee Note to 1948 Amendment to Rule 60(b), 28 U.S.C. at 7827 (1970 ed.)); *U.S. v. $3,216.59*, 41 F.R.D. 433 (D.S.C. 1967) (Motion to open a default judgment under Rule 60(b)(1), Fed. R. Civ. P., failed to state the nature of the mistake alleged and only stated that some mistake occurred. The court also considered the particularity requirement of Rule 9, Fed. R. Civ. P.) The scope of the holdings involved seems quite clear from even this abbreviated catalogue.

8. Respondent's Brief In Opposition suggests that petitioners have read a novelty into the opinion below which is not there. (Brief In Opposition at 5). It is not, however, the novelty—but rather the common law antiquity—of the holding below that is so disturbing.

9. Rule 60(b), Fed. R. Civ. P., was originally taken from §473 of the California Code of Civil Procedure (Deering's Code, 1937). 7 *Moore's Fed. Practice*, ¶60.10[4] at 13.

> formity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' . . . It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that *any doubts which may exist should be resolved in favor of the application*, to the end of securing a trial upon the merits. . . . ' " 324 F.2d at 786, quoting *Brill v. Fox*, 211 Cal. 739, 743-744 (1931).

The *Butner* court continued:

> "In *Karlein v. Karlein*, the district court of appeal said:
>
> 'An appellate [*sic*] court listens more readily to an appeal from an order denying relief under Section 473 of the Code of Civil Procedure. *The law is remedial and any doubt as to the propriety of setting aside a default should be resolved in favor of the application, even in a case where the showing . . . is not strong*. . . . Neither party should be deprived of a hearing except when guilty of inexcusable neglect, and doubts should be resolved in favor of an application to set aside a default judgment.'
>
> "These statements are a good guide to action in this case. *Appellant contends he has a good defense on the merits, namely that the note in question was obtained by means of fraud* and that appellee is not a holder in due course. *Whether or not this is true*, if he is not guilty of inexcusable neglect, *he should have a hearing on the merits*." 324 F.2d at 786. (Footnote omitted.)

Not one word has been said so far about the merits of Martin's claims. The only issues that have been decided are whether or not Martin said enough, whether he said

it "particularly" enough and whether or not he should be granted leave to say more. Not even a single amendment has been allowed. It should be noted that the *Butner* court felt there was "considerable doubt about appellant's reasons." 324 F.2d at 787. The *Butner* court, however, like so many other courts, felt that "doubts should be resolved in favor of an application to set aside the judgment." *Id.* (Footnote omitted; quoting from *Karlein v. Karlein, supra.*) To very similar effect is *Schwab v. Bullock's, Inc.*, 508 F.2d 353 (9th Cir. 1974), wherein the court laid out excellent guidelines for the exercise of district court discretion in the consideration of Rule 60(b) motions, guidelines which, along with *Butner, supra*, were wholly ignored below. While the Ninth Circuit's cases involve vacating a default judgment rather than a judgment by confession, those decisions seem to reject exactly what the court below condoned. Neither the District Court nor the Court of Appeals paid any attention whatever to the holdings or guidelines set out by the Ninth Circuit, and the conclusion reached is contrary to both the rationale and the result of those decisions.[10]

Respondent next contends that the decision below is supported by an independent alternative holding, *to wit*, that the motion for relief from judgment was substantively insufficient as a matter of law. (Brief In Opposition at 6, *et seq.*). In fact, there was no alternative holding. The substantive holding portrayed by respondent clearly conflicts with substantive state law announced in *Young v. Kaye*, 443 Pa. 335 (1971). As such, the course of decision out-

10. In the recent case of *Greater Baton Rouge Craft Assoc. v. Rec. & Pk. Com'n*, 507 F.2d 227 (5th Cir. 1975), the Fifth Circuit also appears to be in conflict with the decision of the Court of Appeals in this case, but the factual situation involved is not as directly conflicting as that in *Butner, supra*. Nonetheless, it seems plain from the rationale that the Fifth Circuit would have reached a contrary result. 507 F.2d at 228.

lined by respondent is contrary to controlling substantive state law and is foreclosed by this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).[11] Moreover, it seems plain that any language regarding the *procedural* sufficiency of the motion below rested on and resulted from the holding requiring a "common law" particularity in federal motion and pleading practice. First, the single allegation which the Court of Appeals considered sufficiently "particular" was that Girard would look solely to Martin in the event of default. 557 F.2d at 390 (App. 36a). Second, this was the only allegation examined by the court below. *Id.* Thus, the Court of Appeals determined, "Furthermore, the charge that the Bank determined to relieve certain co-obligors cannot prevail as a matter of law."[12] *Id.* In sum, once the Court of Appeals had formulated the particularity requirement as merely a restatement of the common law rule, the court then disregarded all of Martin's other allegations and concluded that the motion, whittled down to a single allegation, was procedurally deficient. This is the direct result of the holding presented for review. It was not an independent ground of decision.

Respondent also argues that ". . . petitioners were afforded repeated opportunities to amend their petition at oral argument in response to continued questioning by the District Court. . . ."[13] In fact, no opportunity to amend was provided—whether at, before, during or after oral argument in the District Court or in the Court of Appeals. Martin was not even permitted to amend to state "more particularly" what the Court of Appeals apparently felt was

11. District Court jurisdiction was based on the diversity of the citizenship of the parties. (Complaint at ¶1).

12. This language follows language regarding what is "set forth" in the motion for relief from judgment. 557 F.2d at 390 (App. 36a).

13. Respondent's Brief In Opposition at 10. This is singularly misleading.

already stated—but was fatally lacking the requisite "particularity." Had the District Court actually allowed the opportunity to amend, as respondent claims, to, *e.g.*, incorporate all that was said at the oral argument in the District Court, the Court of Appeals might well have concluded that Martin's statement of the fraud was sufficiently "particular." In any event, there was *no* opportunity to amend at all.

Moreover, it is difficult to understand exactly how an amendment could conceivably be "futile" when the notes containing the authorizations for the judgments confessed below are alleged to be "*prima facie* voidable" under controlling state law. *Young v. Kaye, supra.*

Furthermore, the holding below that failure to allow an amendment was not an abuse of discretion, 557 F.2d at 390 (App. 36-37a), is all but directly in conflict with this Court's prior holding in *Foman v. Davis*, 371 U.S. 178, 182 (1962), in which this Court found an abuse of discretion for failure to grant leave to amend.

Last, respondent argues that no constitutional attack was made below and thus that questions reserved for later decision in *D. H. Overmeyer Co., Inc. of Ohio v. Frick & Co.*, 405 U.S. 174 (1972) are not presented on this record. Martin claimed that failure to open the judgment, allow amendment and/or discovery would work a denial of due process of law *as applied* in the District Court[14], in Martin's Brief[15] and Reply *Brief*[16] on appeal, at oral argument on appeal, and in his petition for rehearing below.[17] Martin did not, of course, claim that the confession of judgment clauses violated due process on their face. That contention

14. Transcript of District Court Oral Argument reprinted in 3d Cir. App. at 71a, 85a.

15. 3d Cir. Brief for Appellants at 20-25.

16. 3d Cir. Reply Brief for Appellants at 7-9.

17. 3d Cir. Petition for Rehearing at 13-15.

was foreclosed by this Court's decision in *Overmeyer, supra.* When the Court of Appeals seemed to share respondent's confusion, that mistaken view of Martin's position become a principal ground for rehearing.[18] Below, those cries fell on deaf ears. However, the constitutional claim that overall, *as applied*, the procedures indulged below operated to deny Martin due process of law, and the attendant right to trial by jury, was vigorously pressed at every stage of the proceedings.[19]

The decision below presents an alarmingly real threat to federal motion and pleading practice generally. The course charted below will plague and clog federal courts by devoting precious judicial energies to deciding what is and what is not "particular enough." The holding below threatens just such a useless dispute over form and phrasing every time a motion is made in a federal court. Similar disputes over form have caused the collapse of earlier judicial systems by diverting courts from deciding the merits of the cases presented. In large part, the Rules were designed to avoid such misallocations and to decide cases on their merits. By reading the very law those Rules were intended to change into the broad command of the Rules themselves, the decision below severely distorts the proper application of the Federal Rules of Civil Procedure. It introduces a startling inflexibility as an across-the-board standard for relief from judgment. It condones a course so radically departing from accepted notions as to deny due process of law in a fashion already considered by this Court as of constitutional dimension and specifically reserved by this Court for later decision. If allowed to stand, the decision below critically endangers many of the most significant reforms sought by the Federal Rules of Civil

18. *Id.*

19. In the District Court, the constitutional dilemma now presented was even anticipated. Transcript, *supra*, n.14 at *id.*

Procedure and dangerously imperils the just and expeditious course of civil litigation in federal courts.

A writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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